2 Otto 676

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 578.

THE SOUTHWESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED SEPTEMBER 8, 1875.

Reversed —

Jas. Strong
Townsite

SUPREME COURT OF THE UNITED STATES.

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1 *Bill of exceptions.*

THE SOUTHWESTERN RAILROAD CO., PLFF. IN error,
vs.
THE STATE OF GEORGIA, DEFT. IN ERROR.

GEORGIA, *Fulton County:*

Be it remembered that during the regular October term of the superior court of said county, for the year 1874, there came on to be tried, before the honorable John L. Hopkins, one of the judges of the superior courts of this State, presiding in said court, the case of The State of Georgia vs. The Southwestern Railroad Company, the same being an issue formed on an affidavit of illegality filed by said defendant to a fi. fa. issued by the comptroller-general of said State, under date of October 2, 1874, to enforce the collection of twenty-eight thousand two hundred and three $\frac{29}{100}$ dollars, as tax due from said defendant to said State, under an act of the general assembly thereof, approved February 28, 1874,
2 and entitled "An act to amend the tax-laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act."

The following is a copy of said fi. fa., with the entry of the officer thereon:

COMPTROLLER-GENERAL'S OFFICE,
State of Georgia, Fulton County:

To all and singular the sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and chattels, lands, tenements, and franchises of the Southwestern Railroad Company, a corporation in this State, you cause to be made the sum of twenty-eight thousand two hundred and three $\frac{29}{100}$ dollars, as its tax for the year 1874, assessed against it upon a return of its taxable property according to law, and costs, and that you pay over said sum of money to
3 the comptroller-general of said State, at his office in Atlanta, Georgia, and return thereto this fi. fa., with your actings and doings entered thereon.

Witness W. L. Goldsmith, comptroller-general of said State, under the seal of said office.

[SEAL.]

W. L. GOLDSMITH,
Comptroller-General of Georgia.

Issued this the 2d day of October, 1874.

GEORGIA, *Bibb County:*

I have this day levied the within fi. fa. on the freight-house in the city of Macon, known as the Southwestern Railroad depot, and three engines, known as the T. M. Furlow, Chipola, and R. R. Cuyler. Levied on as the property of the Southwestern Railroad Company.

GEORGE F. CHENY, *Shff.*

OCT. 3, 1874.

The following is a copy of said affidavit of illegality:

THE STATE OF GEORGIA
vs.
THE SOUTHWESTERN RAILROAD COMPANY. } Tax, fi. fa., and levy.

And now comes the Southwestern Railroad Company, defend-
4 ant in the above-stated fi. fa., and saith that the same has been levied on property of this defendant, and is proceeding illegally, because, it says—

First. That by the charter of incorporation of this defendant, granted the 27th day of December, 1845, by the 14th section thereof, it is provided that said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per centum upon its annual net income; and under said charter the stock of said company was subscribed and paid up and expended in the construction and equipment of its said railroad and appurtenances, and in the purchase and erection of such depots, buildings, and other appurtenances as properly belong to the same, all constituting said railroad and appurtenances; that the said stockholders accepted said charter, and the said provision in the charter has never been repealed or changed by or with the consent of this defendant.

5 Second. That all the property of this defendant, on which said tax is assessed and said fi. fa. issued, is property in which the capital stock of this company is invested, and constitutes as well its stock and its railroad and appurtenances; and the tax so assessed is a tax on its railroad and appurtenances; and the said tax so assessed is a tax which far exceeds a tax on one-half of one per cent. on its annual net income, which last-mentioned tax for the last tax-year has been paid by this defendant to the comptroller-general of the State.

Third. That there is no valid law of this State under which said tax is assessed and said fi. fa. issued; and that the act of the general assembly, assented to February 28, 1874, entitled "An act to amend the tax-laws of this State, so far as the same relates to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with
6 the provisions of this act," is void and of no effect, in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another and greater tax than one-half of one per cent. on the annual net income of this defendant, because said act is in conflict with the constitution of the United States, as being an act impairing the obligation of a contract, and therefore violative of the first paragraph of the tenth section of the first article of the Constitution of the United States.

WM. S. HOLT,
President Southwestern Railroad Company.

Sworn to before me this 27th day of October, 1874.
JNO. T. BOIFEUILLET,
Notary Public Bibb County, Ga.

The trial of said case came on under an agreement of counsel, of which the following is a copy; which agreement was approved by the court:

Illegality against tax fi. fas. in Fulton superior court.

W. L. GOLDSMITH
vs.
THE SOUTHWESTERN RAILROAD COMPANY.

7 We agree that this case be now heard by Hon. John L. Hopkins, judge of the superior court of said county, upon the law and facts, without a jury, subject to review, as is usual. We consent that the charters of the Southwestern Railroad Company and the Muscogee Railroad Company, and the act of 1856, allowing their consolidation, may be considered as in evidence. It is admitted that each was a completed railroad before 1863, that negotiations for their consolidation were being had prior to 1863, but the same were not completed and the consolidation did not take place till the — of November, 1868. It is admitted that the Southwestern Railroad Company has paid the tax of one-half of one per cent. on net income for tax last year, as required by tax-act of 1874, as condition of illegality.

N. J. HAMMOND,
Atty. Genl.
R. TOOMBS, *for State.*
LYON & JACKSON,
Attys. for Deft.

7¼ The following are copies of the charters of the Southwestern Railroad Company and the Muscogee Railroad Company, and the amendments thereto; also, the act of 1856, providing for their consolidation, which were used in evidence on the trial of said case:

CHARTER.

An act to incorporate the Southwestern Railroad Company, with power to extend branches to Albany, in the county of Baker, and Fort Gaines, in the county of Early, or to points below those places on the Flint and Chattahoochee Rivers, and to punish those who may wilfully injure the same, and to incorporate the Columbus and Southeastern Railroad Company.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia in general assembly met, and it is hereby enacted by authority of the same, That for the purpose of constructing a railroad communication between the city of Macon and the nav-
7½ igable waters flowing into the Gulf of Mexico, J. Cowles, E. Alexander, Chas. Day, James Dean, Thaddeus G. Holt, W. B. Parker, A. R. McLaughlin, Charles Cotton, James Rea, Erastus Graves, J. L. Jones, Charles Campbell, Edwin Graves, E. A. Nisbet, H. G. Lamar, J. D. Carhart, J. B. Ross, T. A. Brown, R. H. Randolph, N. C. Munroe, and such other corporation and individuals as may be associated with them, and their assigns, shall hereafter be a body-corporate by the name and style of The Southwestern Railroad Company; and by said corporate name shall be capable in law to buy, hold, and sell so much real and personal estate as may be necessary for said purpose, make contracts, sue and be sued, make by-laws, and do all lawful acts properly incident to a corporation, or necessary and proper for the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter and destroy at its pleasure.

SEC. 2. And be it further enacted by the authority aforesaid, That

that the capital stock of said company shall be two millions of dollars, divided into shares of one hundred dollars each, but may be increased to a sum not exceeding three millions of dollars whenever it may be deemed expedient by a majority of the board of directors of said corporation for a time being.

SEC. 3. And be it further enacted by the authority aforesaid, That the company herein incorporated shall confine their efforts and enterprise to the building and completion of a railroad communication from the city of Macon to some point intermediate between Albany and Fort Gaines, or to any point or points upon the Flint & Chattahoochee Rivers below Albany and Fort Gaines, to be agreed upon by the company; from which point the company may construct branch railroads to Albany and Fort Gaines; said road and its branches being of such width and dimensions as may be deemed expedient by the directors of the company, or their agents, the company paying to owners of land through which the said road or its branc'es may pass a just indemnity for the land covered by the railway, in manner as hereafter provided, and for three hundred feet on each side of the same, for the procurement therefrom of timber, earth, stones, and other materials; and whenever a person shall own land on both sides of said railway, at any point, the company shall be bound to suffer such owner to construct, for his own convenience, such road or bridge across the railroad as may not obstruct, hinder, or incommode its use and passage.

SEC. 4. And be it further enacted by the authority aforesaid, That when the company cannot agree with any person over whose land the railroad may pass, as to the amount of compensation to be paid by the company, or the amount of the damage sustained by the owners, the amount of such damage or injury shall be ascertained and determined by the written award of three sworn appraisers, to be chosen, one by the company, one by the owner of the land if he thinks proper, and one by the inferior court of the county in which the land lies; but if such owner shall decline to appoint an appraiser, then two appraisers to be appointed by the inferior court aforesaid, and one by the said company, the award of whom shall operate as a judgment for the amount against the company, and shall be enforced by an execution from the inferior court, with the right of appeal to either party, to be tried by a special jury, at the next term thereafter of the superior court of said county, and the decision shall vest in the said company the fee-simple of the land in question, and in the other party a judgment for its value thus ascertained, which may be enforced by the ordinary process of said court.

SEC. 5. And be it further enacted by the authority aforesaid, That books of subscription to the stock of said company shall be opened on the first day of March, eighteen hundred and forty-six, at the following places, under the superintendence of the commissioners named, to remain open two days, viz: at Macon, under the superintendence of Elam Alexander, T. G. Holt, James Dean, Briggs H. Moultrie, Charles Day, and J. Cowles; at Perry, Houston County, under the superintendence of James Everett and William Felton; at Traveler's Rest, Dooly County, under the superintendence of John Young and Abel Holton; at Lanier, Macon County, under the superintendence of John Bryan and John C. Helvinston; at Americus, Sumter County, under the superintendence of James R. Daniel and William Dennard; at Starkville, Lee County, under the superintendence of Joseph Bond and Leonidas Mercer; at Albany, Baker County, under the superintendence of George B. King and Phineas M. Nightingale;

at Cuthbert, Randolph County, under the superintendence of Barzilla Graves and William A. Tennelle; at Fort Gaines, Early County,
12 under the superintendence of Joel Crawford and Samuel Gainer. The different sets of commissioners above appointed shall advertise the time, place, and terms of subscription in public gazette or gazett's of the places respectively, and in the event no paper being published in the place, then in the public gazettes of A'bamy and Macon; and such advertisement shall be inserted at least four weeks before the day when the books are to be opened. Upon the books being opened, as aforesaid, the commissioners, or a majority of them, shall receive from individuals, corporations, or companies, subscriptions for any number of shares they may see fit to subscribe for, on condition that at the time of subscribing there should be paid down to the commissioners, or a majority of them, five dollars on each share subscribed for, for which the commissioners shall give a receipt, and forthwith remit the same to the commissioners at Macon, to be by them deposited for safe-keeping in the Commercial Bank at Macon, subject to the draft or order of
13 said company, by its president or board of directors, after the company shall be organized; and the various commissioners shall also forward to the commissioners at Macon a list of the subscribers, with the amount paid, and the number of shares subscribed for set opposite each name. And in the event of any portion of said stock remains unsubscribed for after the closing of the books on the expiration of the two days, then the commissioners at Macon shall be empowered and authorized to procure the balance of the stock so remaining unsubscribed for to be taken up in such time and manner as to them may seem fit; and so soon as one-fourth thereof is taken, they shall call a meeting of the stockholders at Macon, to organize the company in the manner hereinafter pointed out.

SEC. 6. And be it further enacted by the authority aforesaid, That for the organization of the company, the commissioners at Macon
14 shall appoint a suitable time and place for the meeting of the stockholders, which shall be advertised in the gazettes of Macon and Albany for three weeks immediately preceding the day, at which time and place the stockholders may attend in person, or be represented and vote by proxy; and the stockholders being thus assembled shall proceed, under the supervision of the commissioners at Macon, to elect, by ballot, a president and five directors, to serve for one year.

SEC. 7. And be it further enacted by the authority aforesaid, That in said election for president and directors the votes shall be taken by the following rule: Each stockholder shall be entitled to a number of votes equal to the number of shares he may hold in the stock of said company; and on all future elections for president and directors, in the making, altering, or repealing of by-laws, and on determining on measures involving the general interests of the company at any stated or occasional corporate meeting, the votes shall be governed by the
15 above rule.

SEC. 8. And be it further enacted by the authority aforesaid, That the election for the president and directors shall be made annually, according to a by-law to be made for that purpose; and in case any vacancy occur in the board between two periods of general election, the remaining members of the board shall fill such vacancy from the stockholders, by the selection of a suitable person to serve until the next regular election. And if it should so happen that the day of annual election for president and directors should pass without an election being effected on any day for such election, the corporation shall not thereby be dissolved or deemed to be discontinued, but it shall be law

ful on any other day to hold and make such election, in such manner as may be prescribed by the by-laws of the corporation, subject always to the rule prescribed in the seventh section of this act.

SEC. 9. And be it further enacted by the authority aforesaid,
16 That a majority of the directors shall constitute a board for the transaction of business, of whom the president shall be one, save in a case of sickness or necessary absence, in which case his place may be supplied by any director appointed by the president. The board of directors may call for installments on each share, in such amounts and at such times as they may deem necessary for the interest of the company, not to exceed one hundred dollars on each share in the whole, giving at least sixty days' notice in the public gazettes of Macon and Albany of such call; and any and all stockholders failing to pay any installments so called for, within thirty days after the time designated in such call, shall forever forfeit his stock in said company, and all payments which he may have made thereon, and the stock so forfeited shall vest in and become the property of said company, to be disposed of as the board of directors thereof shall determine.

SEC. 10. And be it further enacted by the authority aforesaid,
17 That certificates of stock shall be issued to the stockholders on the payment of the sum required at the time of subscription, which shall be transferable on the books of the company only, and by personal entry of the stockholder or his legal attorney or representative, duly authorized for that purpose.

SEC. 11. And be it further enacted by the authority aforesaid, That the board of directors, for the time being, shall have power to employ engineers, conductors, artists, managers, laborers, and appoint any and all officers that may be necessary for transacting the business of the company, fixing the salary or amount of compensation each and all of such officers shall receive; and the board of directors shall have power to fix the rate of toll upon all produce, goods, wares, merchandise, and other effects transported on the railroad, and also the rate of toll to be charged for each and every passenger passing or traveling thereon, with power to collect the same; and shall be capable of exercising all
18 such other powers and authorities for the well governing and ordering the affairs of said company as to them shall seem fit for the interest of said company.

SEC. 12. And be it further enacted by the authority aforesaid, That the directors shall keep fair and regular entries of their proceedings in a book to be provided for that purpose, and on every question, when any one director may require it, the yeas and nays of the directors voting shall be duly entered on the minutes, and those minutes shall be produced to the stockholders on demand, when at a meeting thereof they shall be required.

SEC. 13. And be it further enacted by the authority aforesaid, That whenever the said railroad shall intersect any public road the company shall be bound to build a safe and substantial bridge, to be afterwards maintained and kept up by the company, and any public or private bridges may at any time be built across the railroad, provided such bridges do not at all obstruct or incommode its use.

19 SEC. 14. And be it further enacted by the authority aforesaid, That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one half of one per cent. upon its annual net income.

SECT. 15. And be it further enacted by the authority aforesaid, That if any person shall wilfully and maliciously destroy, or in any manner damage, injure, or obstruct, or shall wilfully and maliciously cause, or

aid and assist, or counsel or advise any other person or persons to destroy, or in any manner damage, injure, or obstruct said railroad, or any part thereof, or any bridge, vehicle, edifice, right of privilege granted by this act, and constructed for use under authority hereof, such person so offending shall be liable to be indicted, and on conviction thereof shall be imprisoned at hard labor in the penitentiary for a term not less than four years, in the discretion of the court, paying all the expense
20 of the prosecution, and shall also be liable to a suit for damages on the civil side of any court having jurisdiction, at the instance of the company, or any other person aggrieved.

SECT. 16. And be it further enacted by the authority aforesaid, That after the route of said railway shall have been actually surveyed, located, and adopted, and a plat thereof deposited in the department of State, it shall not be lawful for any other railroad to be built, cut, or constructed, in any way or manner, or by any authority whatsoever, running latter'ly within thirty miles of the route so adopted, unless by the said company, or with the consent of the board of directors thereof for the time being: Provided, This act shall not be so construed as to prevent the construction of a railroad from the city of Columbus, as hereinafter provided for by this sct.

SECT. 17. And be it further enacted by the authority aforesaid,
21 That any number of stockholders who together shall be proprietors of five thousand shares shall have the power at any time of calling a meeting of stockholders for purposes or the transaction of any business, or for action of the stockholders touching any matter or thing appertaining to the interest of the company, giving sixty days' notice of such meeting in the public gazettes of Macon and Albany, specifying in their call the objects of the meeting, or the subject-matter to be considered by the stockholders.

SEC. 18. And be it further enacted by the authority aforesaid, That the principal office of the company shall be located at Macon, with subordinate offices or agencies at Albany, and such other places as the board of directors may deem necessary and proper, and all elections and meetings of the stockholders shall be held at the principal office only.

SEC. 19. And be it further enacted by the authority aforesaid,
22 That the said company shall have full power and authority to carry such railroad over all and any rivers, creeks, or water-courses that may be in the route thereof, or of either branch railroad, by suitable bridges or other means: Provided, That when such railway shall cross any navigable water-course, *that* the same shall not be so constructed as to impede or in any way obstruct the navigation thereof.

SEC. 20. And be it further enacted, That the exclusive right granted by this act to the Southwestern Railroad Company to construct, keep up, and use a railroad from Macon to the Flint and Chattahoochee, shall be and continue for fifty years: Provided, nevertheless, That said company shall, after the lapse of said term of fifty years, be and remain incorporated and vested as to their own work, with all the estate, rights, powers, and privileges by this act granted, except the exclusive right aforesaid, but the legislature may renew and extend that exclusive right
23 upon such terms as may be prescribed by law, and be accepted by said incorporated company.

SEC. 21. And be it further enacted, That whenever the mayor and council of the city of Columbus shall deem it expedient to construct a railroad from the city of Columbus to connect with the railroad herein authorized, they or a majority of them shall have power and authority to create a capital stock not exceeding one million of dollars, to be divided into shares of the value, each, not exceeding one hundred dol-

lars, to be subscribed for and transferred under such terms, conditions, and restrictions as may be prescribed by said city council.

SEC. 22. And be it further enacted, That said company, when created, shall be known by the name and style of "The Columbus and Southeastern Railroad Company of Georgia," and by and under such name shall have the right to build and construct a railroad from the said city of Columbus, connecting with or terminating at or near the road
24 herein authorized, at such point or place as may be determined upon by the stockholders of the said Columbus and Southeastern Railroad Company of Georgia, and shall be authorized to have and exercise all the powers, privileges, rights, and immunities, and be subject to all the limitations and restrictions in the building and constructing said road, as are herein prescribed for the Southwestern Railroad Company.

CHARLES J. JENKINS,
Speaker of House of Reps.
ABSALOM H. CHAPPELL,
President of Senate.

Approved December 27, 1845.

GEORGE W. CRAWFORD,
Governor.

SECRETARY OF STATE'S OFFICE, GEORGIA,
Milledgeville, Dec. 29, 1845.

I certify that the above and foregoing is a true copy of the original act, deposited in this office.

Given under my hand and seal.

N. C. BARNETT,
Secretary of State.

25 AMENDMENTS TO CHARTER.

An act to amend an act incorporating the Southwestern Railroad Company, approved December 27th, 1845.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia, in general assembly met, That the Macon commissioners under the act incorporating said company may call a meeting of stockholders to organize said company, and to elect directors of the same, as soon as the sum of two hundred thousand dollars shall have been subscribed towards said road.

CHARLES J. JENKINS,
Speaker of House of Representatives.
ANDREW J. MILLER,
President of Senate.

Approved December 30, 1847.

GEO. W. TOWNS,
Governor.

An act to amend an act entitled An act to incorporate the Southwestern Railroad Company, with power to extend branches to Albany, in the county of Baker, and Fort Gaines, in the county of Early, or to points below those places on the Chattahoochee and Flint Rivers,
26 and to punish those who may wilfully injure the same, assented to December 27th, 1845, and for other purposes.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia, in general assembly met, and it is hereby en-

acted by authority of the same, That from and after the passage of this act, said railroad company shall have power and authority to construct a branch of said road, from some point on said road to any point on the Chattahoochee River below the town of Florence, in the county of Stewart, which said company may deem most advisable and proper, under the rules and restrictions as they are now authorized to construct said Southwestern Railroad: Provided, That if said company do not build the main trunk of said road to or below Fort Gaines within two years from the time that the same is completed to the point at which the said branch road, if commenced, may intersect, then said company shall be liable to refund to the stockholders now residing in Early and
27 Randolph Counties, or their assigns, the amount of stock held by them, with interest from the time the same was paid.

SEC. 2. And be it further enacted, That all laws and parts of laws militating against this act be, and the same are hereby, repealed.

Approved February 23, 1850.

An act to incorporate the Muscogee Railroad Company, and to punish persons for violating the provisions of the same.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia, in general assembly met, and it is hereby enacted by the authority of the same, That for the purpose of constructing a railroad from the city of Columbus to West Point, at or near the Monroe Railroad, from Macon to the terminus of the Western and Atlantic Railroad, in De Kalb County, to be selected and determined upon by the directors hereinafter authorized to be elected, that
28 John G. Winter, John Banks, A. H. Flewellen, James M. Chambers, Samuel A. Baily, John H. Howard, T. B. Howard, James B. Jones, William A. Redd, H. S. Smith, Daniel McDougal, Hines Holt, Gr'gsby E. Thomas, James H. Shorter, and P. T. Schley, and their associates, successors, and assigns, be, and they are hereby, created a body-politic by the name and style of "The Muscogee Railroad Company," with vested rights and privileges, and by said corporate name and style shall be capable in law to purchase, accept, hold, and sell, and convey real and personal estate, make contracts, sue and be sued, to make by-laws, appoint all necessary officers and prescribe their duty, and to do all lawful acts properly incident and connected with the objects of the said corporation, and necessary for the government and transaction of its business, to construct a railroad from the city of Columbus to such point at or near the Monroe Railroad, from the city of Macon to the terminus of the Western and Atlantic Railroad
29 in De Kalb County, and to make and use a common seal, and the same to alter and destroy at their pleasure: Provided, That their by-laws be not repugnant to the Constitution and laws of the United States, or of this State.

SEC. 2. And be it further enacted, That the capital stock of said company shall not exceed two millions of dollars, to be divided into shares of not exceeding one hundred dollars each, and the board of directors shall prescribe the mode and conditions of the subscriptions for the stock in said company, and issue certificates for the same.

SEC. 3. And be it further enacted, That for the organization of the said company, the said persons hereinbefore named, or a majority of the same, shall appoint the times and places at which subscriptions for stock in said company may be made, and shall immediately thereafter appoint a convenient time and place for the meeting of the subscribers
30 for stock, in the city of Columbus, of which they shall give notice

in one or more of the public gazettes published in said city, at which time and place they shall proceed to the election of seven directors, who shall form and constitute the first board of directors, one of which said directors shall elect as president thereof, and said president and directors shall hold their offices for one year, and shall prescribe in their by-laws the manner of holding the subsequent annual elections for directors; and in all cases the stockholders shall be allowed to vote in person or by proxy, under power of attorney duly executed. The number of votes to which each stockholder shall be entitled shall be according to the number of shares he, she, or they may hold in his, her, or their own right or as trustee for three months prior to the election, one vote for each share. The said board of directors shall have power to fill all vacancies which may occur in their board or other offices until the regular annual election by the stockholders, and
31 shall fix the compensation of the president of said board, and all other officers of the said corporation. Not less than three directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness or necessary absence, in which case his place may be supplied by any one of the directors present, to be elected president pro tem. by a majority of the board present.

SEC. 4. Be it further enacted, That the said board of directors shall have power to select and take, or receive as donation, such strips of land as they may deem necessary for the construction, convenience, and protection of said railroad, and in case of disagreement between the owner or owners and the said board of directors in regard to the damage or price of any such necessary strip or strips of land, it may and shall be lawful for said board to appoint one disinterested freeholder as an appraiser, and the owner or owners of such land another disin-
32 terested freeholder, if he, she, or they should think proper, and the justices of the inferior court, or a majority of them, of the county in which such lands may lie, shall appoint another disinterested freeholder; but if such owner or owners shall decline to appoint an appraiser on his, her, or their part, then two shall be appointed by the justices aforesaid, all of whom shall be sworn by a justice of the inferior court, or justice of the peace, to make and return to said court a just, true, and impartial valuation of the damages or value of such strip or strips of land thus required by said company, and their award shall be in writing and signed by at least a majority of said appraisers, and accompanied by a plat and full description of the said land, which shall be taken and held as a judgment for the amount against the said company, and may be enforced by an execution from the said inferior court, and the said plat and description of said land, and said award, shall be recorded in the said county in the same manner as deeds, and
33 shall vest the fee-simple right to the said strip or strips of land in the said corporation: Provided, That if either party shall be dissatisfied with the award of the appraisers, he, she, or they may appeal to the superior court of the county where the land lies and have the damages ascertained by the verdict of a special jury at the first time, and such verdict shall be conclusive and binding on both parties.

SEC. 5. Be it further enacted, That the capital stock of the said railroad company shall not be taxed by the State higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on the stock of said company.

SEC. 6. Be it further enacted, That the said company shall build and keep in good order substantial bridges or ways of passage across

said railroad wherever it may cross a public road, and if any person shall willfully and maliciously destroy, or in any manner hurt, damage, injure, or obstruct, or shall counsel, aid, or assist, or advise any other person or persons to hurt or otherwise injure and obstruct said railroad, or any of the appurtenances or appendages thereto belonging or appertaining, such person so offending shall be liable to be indicted for a misdemeanor, and, on conviction thereof, shall be imprisoned at hard labor in the penitentiary, at the discretion of the court, for a term not less than four years, and shall further be liable to pay all expenses of repairing or rebuilding the same.

SEC. 7. And be it further enacted, That the books, papers, and correspondence, and the funds of said company, shall at all times be subject to the inspection of the board of directors and the stockholders at any and every meeting thereof, when required; and all bonds, notes, or other evidences of debt or contract, or liability or engagement on behalf of said company, shall be binding & obligatory on said corporation when the same shall be signed by the president of said company, and countersigned or attested by the secretary thereof, and the funds of said company shall in no case be held responsible for any contract or engagement unless the same shall be so signed, countersigned, or attested, as aforesaid.

SEC. 8. And be it further enacted by the authority aforesaid, That the stockholders in said company shall be liable in proportion to the number of shares held by them, respectively, for the debts of said company, which shall not exceed one-half of the capital stock.

Approved December 27, 1845.

An act to amend an act entitled "An act to incorporate the Muscogee Railroad Company, and to punish persons for violating the provisions of the same," approved December 27, 1845, and to authorize said company to take and hold in fee-simple the plat of ground granted to the same by the mayor and council of city of Columbus.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia in general assembly met, and it is hereby enacted by the authority of the same, That from and after the passage of this act the first Monday in January of each year, or each alternate year, if so ordered by the stockholders, shall be the day appointed for the election of directors; and if there should be no election on that day, the president of the company shall appoint some other day for said election, within sixty days after such failure, and shall give due notice of said election by advertisement in one or more of the public gazettes of the city.

SEC. 2. And be it further enacted, That the president and directors shall in all cases hold their offices until their successors shall be duly elected and qualified.

SEC. 3. And be it further enacted, That said company may take and hold in fee-simple the plat of ground on the east common in the city of Columbus, granted by the mayor and council of said city for railroad purposes.

SEC. 4. Be it further enacted, That the board of directors shall have power to adopt such rules and regulations with regard to the transfer of stock as may seem most conducive to the interest of said Muscogee Railroad Company.

SEC. 5. And be it further enacted, That all laws which conflict with and militate against this act be, and they are hereby, repealed.

CHARLES J. JENKINS,
Speaker of the House of Representatives.
ANDREW J. MILLER,
President of the Senate.

Approved December 27, 1847.

GEORGE W. TOWNS,
Governor.

An act to alter and amend the third section of an act entitled "An act to amend an act to incorporate the Muscogee Railroad Company, and to punish persons for violating the provisions of the same," approved December 27th, 1845, and to authorize said company to take and hold in fee-simple the plat of ground granted to the same by the mayor and council of the city of Columbus, passed the 27th December, 1847, so far as to change the shape of said plat of ground, and for other purposes therein mentioned.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia in general assembly met, and it is hereby enacted by authority of the same, That from and immediately after the passage of this act the Muscogee Railroad Company may take and hold in fee-simple the plat of ground containing four acres on the east common, for the purpose of a railroad depot, lying south of the railroad depot, and between Randolph and St. Clair streets, granted to said company by the mayor and council of the city of Columbus, by a resolution of the same adopted on the eleventh day of December, in the year 1849: Provided, Said company shall relinquish to the city of Columbus all their right to the use of four acres of land lying east of their said depot, any law, usage, or custom to the contrary notwithstanding.

Approved February 14, 1850.

An act to authorize the Central Railroad and Banking Company of Georgia, the Macon & Western Railroad Company, and the Southwestern Railroad Company, to unite their respective railroads in one common depot, at or near the city of Macon, and to grant to the said companies a quantity of land for the said purpose on the public reserve east of the city of Macon, with the right of way through the said public reserve to the said depot for their respective tracks.

Whereas there has been expended in the State by incorporated companies, and from the State treasury, very large sums of money for the purpose of opening and constructing railroads from the sea-board to the western limits of the State; and whereas, in order that the State and the citizens thereof should derive the full benefit intended by the line of railroads so constructed, it is expedient that the transportation of freight and passengers over said line shall be as free from interruption and transhipment as possible:

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia in general assembly met, and it is hereby enacted by the authority of the same, That from and after the passing of this act it shall be lawful for the Central Railroad and Banking Company, the Macon and Western Railroad Company, and the Southwestern Railroad Company to unite their respective railroads in one com-

mon depot at or near the city of Macon, so that the cars of the respective roads may pass from one road to another uninterruptedly.

SEC. 2. And be it further enacted by the authority aforesaid, That
41 in case a suitable site for said common depot, with a sufficient quantity of land, cannot be obtained by said companies within the corporate limits of the said city of Macon on terms reasonable and satisfactory both to the corporate authorities of the said city of Macon and the said railroad companies, or in case the consent of the corporation of the said city of Macon cannot be obtained for the said roads to be united within said corporate limits, the said companies may propose to the said corporate authorities to have the value of land necessary for a depot, and the right of way to it, as also to damages to the vested rights thereby sustained, ascertained and assessed against said companies, respectively, according to the provisions of their respective charters in relation to disputes with the owners of lands; and if the said corporate authorities shall refuse to accede to said proposal, then a sufficient quantity of said land, not exceeding thirty acres, to be paid for at a fair price, to be assessed by
42 commissioners appointed by the governor for that purpose, is hereby granted for the use of said companies, and for the above-mentioned purpose, on the lands known as the public reserve lying eastwardly of and adjoining the corporate limits of the said city of Macon; and that the said companies shall, after the passage of this act, have the right and power to enter upon the said public reserve and establish and locate the cite of their common depot in the most convenient part of the said reserve, and so lay out and mark such tract as may be necessary for said purpose, not exceeding thirty acres; and when such tract of land shall have been so laid out and located, a plat thereof shall be deposited in the office of the surveyor-general, and the title to said tract so located shall be thereafter vested in said companies jointly, for the purpose of a depot, and for no other purpose whatsoever; and whenever said tract of land shall cease to be used for the purpose of a depot, it
43 shall then revert to and become again the property of the State of Georgia, and parcel of the aforesaid reserve.

SEC. 3. And be it further enacted by the authority aforesaid, That it shall be lawful for the said Central Railroad and Banking Company of Georgia to build, erect, construct, keep, and enjoy, as part and parcel of the Central Railroad, a railroad from any eligible or suitable point in and connected with the said Central Railroad to the said common depot, whenever the same may be located; and also for the said The Macon and Western Railroad Company to build, erect, construct, keep, and enjoy, as part and parcel of the Macon and Western Railroad, a railroad from any eligible or suitable point, and connected with the Macon and Western Railroad to the said common depot, whenever the same may be located; and also for the said The Southwestern Railroad Company to construct and extend its railroad to the said common depot whenever
44 the same may be located; and also for the said companies, respectively, to build all the necessary works to carry the establishment of said common depot into effect, paying to owners of property through which they may pass for whatever damages they may do to their premises, as provided for by the respective charters of the aforesaid companies; and the said companies, and each of them, shall have power, and the same is hereby granted, to pass through the public reserve with their respective railroads in order to reach the said common depot, whether the said common depot shall be established on the said public reserve or within the corporate limits of the city of

Macon, and shall be entitled to use land of sufficient width for their tracks and roads through said reserve for that purpose.

SEC. 4. And be it further enacted by the authority aforesaid, That all laws and parts of laws militating against this act be, and the same are hereby, repealed.

Approved February 11, 1850.

45 An act to authorize the connection of the Muscogee Railroad with the Opelika Branch Railroad and the Mobile and Girard Railroad, at Columbus.

Whereas it will promote the interest and convenience of the people of Georgia and Alabama, as well as the public generally, to connect the Muscogee Railroad with the Opelika Branch Railroad and Mobile and Girard Railroad:

SECTION 1. Be it enacted, That the president and directors of said roads shall have the power of connecting their said roads by extending them through the city commons and streets of Columbus, with such side-tracks, turn-outs, and sheds as may be necessary for the convenience of freights and passengers: Provided, They first obtain the consent of the people of the city of Columbus upon such terms as may be agreed on and shall be satisfactory to them.

Assented to December 21st, 1857.

46 An act to authorize and empower the Muscogee Railroad Company to connect their railroad with the Southwestern Railroad, and for other purposes therein named.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Georgia in general assembly convened, and it is hereby enacted by authority of the same, That from and immediately after the passage of this act the Muscogee Railroad Company be, and are hereby, authorized and empowered to connect their railroad with the Southwestern Railroad at Fort Valley, or at any point between Fort Valley and the city of Macon.

Approved February 5, 1850.

An act to authorize and provide for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company.

47 SECTION 1. Be it enacted, &c., That upon a vote of a majority of two-thirds of the stockholders, in amount, in the aforesaid companies respectively, in favor of the union and consolidation of the Muscogee Railroad Company, its franchises and property, with the said Southwestern Railroad Company under the charter of the last-mentioned company, on such terms as the said companies may respectively agree, it shall be lawful so to unite and consolidate the said two companies into one, under the charter of the Southwestern Railroad Company.

SEC. 2. And be it further enacted, That upon such union and consolidation the capital stock of the Southwestern Railroad Company shall not exceed the amount of the present authorized capital thereof and the present authorized capital of the Muscogee Railroad Company.

SEC. 3. And be it further enacted, That upon such union and
48 consolidation as is hereinbefore provided for, the holders of stocks in the Muscogee Railroad Company shall surrender their certificates of stock to the Southwestern Railroad Company and receive in

lieu thereof certificates of stock in the Southwestern Railroad Company, to such an extent and amount as the said two companies may agree on; and thenceforward all the rights, privileges, and property of the said Muscogee Railroad Company shall be part and parcel of the said Southwestern Railroad Company, and all the chartered rights and privileges of the Southwestern Railroad Company be extended over the track and line of the Muscogee Railroad Company, and everything appertaining thereto; the name and style of the consolidated company shall be and continue "The Southwestern Railroad Company."

SEC. 4. And be it further enacted, That upon the union and
49 consolidation of said companies all the debts and liabilities of the Muscogee Railroad Company shall be assumed and paid by the Southwestern Railroad Company.

SEC. 5. And be it further enacted, That this act shall go into operation when, and not until, there shall be a vote of a majority of two-thirds of the stockholders, in amount of stock of each of said companies, in favor of this union and consolidation, and of the provisions of this act, certified under the corporate seals of said companies, respectively, to his excellency the governor of this State.

SEC. 6. And be it further enacted, That if, from any cause, the union and consolidation of the said companies hereinbefore provided for shall not take effect, then it is hereby declared that nothing herein contained shall affect, alter, or change in any way the present existing rights of the said companies, respectively.

Approved March 4th, 1856.

50 After hearing argument in said case, the court passed an order overruling the affidavit of illegality, and ordering said fi. fa. to proceed, to which order this defendant excepts, and assigns the same as error.

And now, during the session of said court, defendant tenders this its bill of exceptions, and prays that the same may be certified according to the statute.

This 23d December, 1874.

LYON & JACKSON,
JACKSON, LAWTON & BASINGER,
JACKSON & CLARK,
Defendant's Attorneys.

51 I do certify that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the superior court of Fulton County is hereby required and ordered to make out a complete copy of the record of said case, and certify the same as such, and cause the same to be transmitted to the next January term of the supreme court, that the errors alleged to have been committed may be considered and corrected.

This 26th day of December, 1874.

JNO. L. HOPKINS,
Judge Sup'r Courts, Atlanta Circuit.

GEORGIA, *Fulton County:*

I, Jas. D. Collins, clerk of the superior court in & for said county, do certify that the above & foregoing is the true original bill of exceptions in the case Southwestern Railroad, plff. in error, vs. The State of Geor-

gia, deft. in error, as appears of file in my office, & that said court is now in session.

Given under my hand & seal of office this 28th December, 1874.

[SEAL.] JAS. D. COLLINS, *C. S. C.*

52 Service of the within bill of exceptions acknowledged and copy waived.

This 26th day of December, 1874.

N. J. HAMMOND,
Atty. Gen'l for State.

Filed in office Dec. 28, 1874.

Z. D. HARRISON,
Clk. S. C., Ga.

53 STATE OF GEORGIA,
Fulton County:

COMPTROLLER-GENERAL'S OFFICE.

To all and singular the sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and chattels, lands, tenements, and franchises of the Southwestern Railroad Company, a corporation in this State, you cause to be made the sum of twenty-eight thousand two hundred and three $\frac{29}{100}$ dollars, as its tax for the year 1874, assessed against it upon a return of its taxable property according to law, and that you pay over said sum of money to the comptroller-general of said State, at his office in Atlanta, Georgia, and return thereto this fi. fa., with your actings and doings entered thereon.

Witness W. L. Goldsmith, comptroller-general of said State, under the seal of said office.

Issued this 2d day of October, 1874.

W. L. GOLDSMITH,
Comptroller-Genl. of Georgia.

54 GEORGIA, *Bibb County:*

I have this day levied the within fi. fa. on the freight-house in the city of Macon, known as the Southwestern Railroad depot, and three engines, known as the T. M. Furlow, Chipola, and R. R. Crigler; levied on as the property of the Southwestern Railroad Company.

October 3d, 1874.

GEO. F. CHERY, *Shff.*

Levy suspended by filing of affidavit of illegality under the act of 28th Feb'y, 1874.

GEO. F. CHERY, *Shff.*

Received two dollars, costs of levy, from defendant.

GEO. F. CHERY, *Shff.*

THE STATE OF GEORGIA
vs.
THE SOUTHWESTERN RAILROAD COMPANY. } Tax, fi. fa., & levy.

And now comes the Southwestern Railroad Company, defendant in the above-stated fi. fa., and saith that the same has been levied on
55 property of this defendant, and is proceeding illegally, because, it says—

First. That by the charter of incorporation of this defendant, granted

27th day of December, 1845, by the 14th section thereof, it is provided that said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per centum upon its annual net income, and under said charter the stock of said company was subscribed and paid up, and expended in the construction and equipment of its said railroad and appurtenances, and in the purchase and erection of such depots, buildings, and other appurtenances as properly belonging to the same, all constituting said railroad and appurtenances; that the said stockholders accepted said charter; and that the said provision in the charter has never been repealed or changed by or with the consent of this defendant.

Second. That all the property of this defendant on which said
56 tax is assessed and said fi. fa. issued is the property in which the capital stock of this company is invested, and constitutes as well its stock and its railroad and appurtenances, and the tax so assessed is a tax on its said railroad and appurtenances, and the said tax so assessed is a tax which far exceeds a tax of one-half of one per cent. on its annual net income, which last-mentioned tax for the last tax-year has been paid by this defendant to the comptroller-general of the State.

Third. That there is no valid law of this State under which said tax is assessed and said fi. fa. issued, and that the act of the general assembly, assented to Feb'y 28th, 1874, entitled "An act to amend the tax-laws of this State so far as the same relates to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may
57 conflict with the provisions of this act," is void and of no effect, and in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another and greater tax than one-half of one per cent. on the annual net income of this defendant; because said act is in conflict with the Constitution of the United States, as being an act impairing the obligation of a contract, and therefore violative of the first paragraph of the tenth section of the first article of the Constitution of the United States.

WM. S. HOLT,
President Southwestern Railroad Company.

Sworn to before me this twenty-seventh day of October, 1874.
JNO. T. BOEFEMLLET,
Not'y Public, Bibb County, Ga.

BOND.

STATE OF GEORGIA,
Bibb County:

Know all men by these presents, that the Southwestern Railroad Company, as principal, and Wm. B. Johnston and John E. Jones,
58 as securities, are held and firmly bound unto the governor of the State of Georgia and his successors in the sum of sixty thousand dollars, for the payment of which they bind themselves by these presents.

In witness whereof the said railroad company hath caused these presents to be signed by its president and countersigned by its cashier, and sealed with its corporate seal, and the said securities have set their hands and seals this 26th day of October, 1874.

The condition of this obligation is that, whereas the comptroller-general of the State of Georaia hath issued against the said Southwestern

Railroad Company an execution for taxes for the year 1874 for the sum of twenty-eight thousand two hundred & three $\frac{29}{100}$ dollars, alledged to be due from said company, and the same has been levied upon the property of the said company in the county of Bibb, and said company is
59 about to file its affidavit of illegality, to stop the proceeding of said execution:

Now, if the said Southwestern Railroad Company shall pay said execution so levied for taxes in case it shall be ultimately adjudged by the courts having jurisdiction of said case that it is liable to pay the same, then this bond to be void; else to be in full force.

WM. S. HOLT,
President Southwestern R. R. Co.
W. B. JOHNSTON. [L. S.]
J. E. JONES. [L. S.]

Attest:
JNO T. BOIFEMLLET,
Secty. & Treasr., &c.
In presence of—
R. W. JEMISON, JR.,
Not. Pub. Bibb Co., Ga.

Filed in office Nov. 11th, 1874.

J. D. COLLINS, *Clk.*

In the superior court of Fulton Connty.

W. L. GOLDSMITH
vs.
THE SOUTHWESTERN RAILROAD COMPANY. } Illegality against tax, fi. fa.

We agree that this case be now heard by Hon. Jno. L. Hopkins, judge of the superior court of said county, upon the law and facts, with-
60 out a jury, subject to review as is usual. We consent that the charters of the Southwestern Railroad Company and the Muscogee Railroad Company, and the act of 1856, allowing their consolidation, may be considered as in evidence.

It is admitted that each was a completed R. R. before 1863, and that negotiations for this consolidation were had, being had prior to 1863; but the same were not completed and consolidation did not take place till the of November, 1868. It is admitted that the S. W. R. R. Co. has paid the tax of one-half of one per cent. on net income for last year, as required by tax-act 1874 as condition of illegality.

N. J. HAMMOND,
Atty. Genl.
R. TOMBS,
For State.
LYON & JACKSON,
Attys. for Deft.

After argument had, it is ordered and adjudged that the oath of illegality be overruled and that this fi. fa. proceed and defendants pay dollars costs.

This 17 Dec., 1874.

N. J. HAMMOND,
Atty. Genl.

61 GEORGIA, *Fulton County:*

I, Jas. D. Collins, clerk of superior court in and for said county, do certify that above and foregoing is a true and complete transcript of the record in the case of The State of Georgia vs. The Southwestern R. R. Co., as appears of record, and that said court is now in session.

Given under my hand and seal of office this December 28th, 1874.

JAS. D. COLLINS, *Clk. S. C.*

62

63 SUPREME COURT OF THE STATE OF GEORGIA,
Tuesday, June 17, 1875.

The honorable supreme court met pursuant to adjournment.

Present, their honors Hiram Warner, chief-justice, and H. K. McCay & R. P. Trippe, associate justices.

The following judgment was rendered:

THE SOUTHWESTERN RAILROAD COMPANY, plff. in error,
vs.
THE STATE OF GEORGIA, DEFT. IN ERROR.

This case came before the court upon a transcript of the record from the superior court of Fulton County, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

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67 *Opinions supreme court of Ga., January term,* 1875.

CENTRAL R. R. & B'K'G CO.
vs.
THE STATE.

SOUTHWESTERN R. R. CO.
vs.
THE STATE.

THE STATE
vs.
SAVANNAH & AUGUSTA R. R. CO.

Opinion of Warner, C. J.:

On the 28th of February, 1874, the general assembly of the State of Georgia passed an act to amend the tax-laws of the State, so far as the same related to the railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies respectively as might conflict with the provisions of that act. The act requires the presidents of all the railroad companies in the State to return, on oath, annually, to the comptroller-
68 general, the value of the property of their respective companies, without deducting their indebtedness, to be taxed as other prop-

erty of the people of the State; and provides for the collection of the same.

The 4th section of the act repeals all conflicting laws.

In accordance with the provisions of the above-recited act, the comptroller-general of the State issued executions against the Central Railroad & Banking Company of Georgia, the Southwestern Railroad Company, and the Augusta and Savannah Railroad Company for the collection of the tax claimed to be due to the State by each company respectively. The companies filed affidavits of illegality to the executions as provided by the act of 1874, and, on the hearing thereof in the court below, the court overruled the grounds taken in the affidavits of illegality by the Central Railroad and Banking Company and the Southwestern Railroad Company; whereupon the defendants excepted, and allege the same as error. The court sustained the affidavit of illegality made by the Augusta & Savannah Railroad Company, whereupon
69 the State excepted, and assigned the same as error.

The three cases were argued together here.

It is insisted by the plaintiff in error, in the two first-named cases, that the act of 1874 is unconstitutional and void, because it impairs the obligation of the contract made by the respective companies with the State, under the respective charters thereof, within the true intent and meaning of the 10th section of the 1st article of the Constitution of the United States.

By the original charter of the Central Railroad & Banking Company, granted to it in 1835, it is provided "that said railroad and the appurtenances of the same shall not be subject to be taxed higher than one-half of one per centum upon its annual net income." By the original charter of the Southwestern Railroad Company, granted to it in 1845, it is provided "that the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income."

70 If the defendants were now before the court, under the original charters as granted by the State, and as then accepted by each company, that would have been an executed contract between the State and the respective companies, and the State, as the law then stood, could not have impaired the obligation thereof by the passage of the act of 1874. But do the defendants now stand before the court as they would have stood under the law as it existed at the time of the granting and acceptance of the original charters? Have the two companies accepted new charters under a new and different law than that which existed in the State at the time the original charters were granted and accepted? If the two companies have obtained new charters and new charters and new grants from the State since the enactment of such new law, and accepted the same, then that new law of the State entered into and formed an essential element of the contract between the State and the two companies.

By the general law of this State, as declared on the 1st of Jan-
71 uary, 1863, (that being the time the Code took effect as the law of the State,) corporations are either public or private. A public corporation is one having for its object the administration of a portion of the powers of government delegated to it for that purpose. Such are municipal corporations. All others are private, whether the object of incorporation be for public convenience or individual profit, and whether the purpose be, in its nature, civil, religious, or educational. In all cases of private charters hereafter granted the State reserves the right to withdraw the franchise, unless such right is expressly negatived

in the charter. Private corporations, heretofore created, without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State. (New Code, secs. 1671, 1672–3, 1642, 1643.) Should any charter granted in future by the general assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant. (Code, 1639.) In the case of the
72 West End and Atlanta Street Railroad Company vs. The Atlanta Street Railroad Company, 49th Ga. Rep., 151, this court, in giving an interpretation to the 1642d section of the Code, held that the power reserved by the State to withdraw the entire franchise necessarily included the power to modify or restrict the exercise of it. This court also held, in that case, that this section of the Code introduced a new element into the law of private corporations in this State, and that all charters granted by the State to private corporations since its adoption are subject to its provisions, and that the acceptance by the company of the grant made by the general assembly must be understood as having done so with a full knowledge of this general law, as much so as if it had been inserted in the act of incorporation; for it is a well-established rule that the laws which exist at the time and place of the making of a contract, applicable thereto, enter into and form a part of it.

In August, 1872, the general assembly of the State passed an act
73 to authorize and provide for the union and consolidation of the Macon and Western Railroad Company with the Central Railroad & Banking Company of Georgia, under the name and charter of the latter company. By this act the two companies were authorized and empowered to unite and consolidate the stocks of said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said Central Railroad and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated company. The act further provides that neither company should be discharged from any contract previously entered into, but all such contracts shall be assumed by and be binding on the Central Railroad & Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last-mentioned company,
74 and that the capital stock of the Central R. R. & Banking Company of Georgia shall not exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon and Western Railroad Company added thereto. The 2 section of the act provides for the assent of the stockholders of each company to the consolidation. The 3rd section provides for notification to the governor of the consolidation of the two companies under the act. The 4th section provides that each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a stockholder in the Central Railroad & Banking Company of Georgia, for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the rights, privileges, and benefits as attach to the holders of stock now held by the shareholders in said companies or either of them. The 5th section repeals all conflicting laws.

Was this an act of incorporation as defined by the common law and by our own Code? A corporation, as defined by the ancient com-
75 mon law, is a franchise created by the king, and is a body consti-

tuted by policy, with a capacity to take or to do. (4th Comyn's Digest, top page 465, title, Corporation.) There need not be any precise words to make a corporation. Anciently, if the king had granted to a vill, gildam mercatoriam, it was, by such grant, incorporated. (4th Comyn's Digest, top page 470; see, also, 2nd Kent's Com., 307; Denton vs. Jackson, 2nd Johns. Chancery Reports, 324.) One corporation may be made out of another corporation. (6th Viner's Ab., 260.) A corporation, as defined by our Code, is an artificial person, created by law for specific purposes, the limit of whose existence, powers, and liabilities is fixed by the act of incorporation usually called its charter. (New Code, 1670.)

The specific purposes for which this charter was granted by the State is manifested by the terms of the charter. The State created by law this corporation, and granted to it the right and privilege to unite and consolidate the stocks of the two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said Central
76 Railroad and Banking Company of Georgia, in such manner as is specified therein. In other words, the State granted to this corporation all the rights, privileges, &c., which belonged to either company, under the name and charter of the Central Railroad and Banking Company, and the new consolidated company was to have the same rights, privileges, and immunities as the Central Railroad and Banking Company had under its charter. Instead of specifying in the new act of consolidation what the rights, privileges, and immunities of the Central Railroad & Banking Company were, reference must now be had to its original charter to ascertain them. The fact that the consolidation act of incorporation confers upon the new company the same rights, privileges, and immunities as were conferred upon the Central Railroad and Banking Company, has no more legal significance than if the words of its original charter had been incorporated into the new consolidation act. Under the new consolidation act of incorporation the company has conferred upon it, by the grant from the State, all the rights, privileges, and immunities which were conferred by the original char-
77 ter of the Central Railroad & Banking Company, and in order to ascertain what those rights, privileges, and immunities are, we must look to that original charter, inasmuch as the same are not specified in the new consolidation act of incorporation; but that does not prove that the act of August, 1872, was not a legal act of incorporation by the general assembly of the State. There are many acts of incorporation in this State which refer to the charters of other incorporated companies, as to the powers, privileges, immunities, and franchises granted by the general assembly, but it has never been doubted that such acts were valid acts of incorporation.

The contract between the State and the Central Railroad & Banking Company, under the act of August, 1872, is not the same contract as that made with it by the State in 1835. That company acquired new rights and other privileges, under the act of 1872, in addition to those granted to it in 1835. It is true that, in addition to the rights and privileges granted by the act of 1872, the general assembly also granted to the new company by that act all the rights, privileges, immunities, property, and franchises belonging or attaching to the Central
78 Railroad and Banking Company as specified in its charter of 1835, but the acceptance of the grants contained in the act of 1872 by the company was a new contract with the State. There was a new consideration obtained by the company under the charter of 1872

which did not exist under the charter of 1835, and there was a new party introduced by the charter of 1872 and consolidated with the company, to wit, the Macon and Western Railroad Company, and the acceptance of the charter of 1872 by the company, upon a new consideration and with a new party consolidated into the company, was such a novation of the original contract, under the old charter, as put an end to it, and created a new company under the charter of 1872, which, under the general laws of the State, will not expire until thirty years from the date of the charter. (See new Code, 2724, as to novation of contract.) If, however, the general assembly of the State, by the act of 1872, had done nothing more than simply renew the charter of the company granted to it in 1835, with all its rights, privileges, immu-
79 nities, and franchises as therein specified, and the company had accepted the same, would it not have been accepted in view of the general law of the State as declared by the Code of 1863? But the act of 1872 does much more than that, as will readily be perceived by referring to its provisions.

The main point in the case is, whether the grant of exemption from taxation, as specified in the charter of 1835, and referred to in the act of 1872, as one of the privileges and immunities granted to the company, is such an executed contract, between the State and the company, the obligation of which the State cannot impair by withdrawing the franchise granted. By the general law of the State at the time the charter of August, 1872, was granted by the general assembly consolidating the two companies, and at the time of its acceptance, the State had reserved the right, by her public law, to withdraw the franchise granted, unless such right to withdraw had been expressly negatived in the charter.

80 The 4th section of the new Code declares that, in the construction of all statutory enactments of this State, the ordinary signification shall be applied to all words except words of art, &c. The ordinary signification of the word "franchise," as defined by Webster, is, "a particular privilege or right granted by a prince or sovereign to an individual, or to a number of persons; an exemption from a burden or duty to which others are subject." In a legal sense, franchise and liberty are used as synonymous terms, and the kinds of them are various and almost infinite. (2nd Blk. Com., 37.) To "withdraw" is to take away what has been enjoyed, to take from. It may be conceded that the company, under its charter of 1872, had, as one of its franchises granted to it by the State, the right to be exempted from the payment of a higher tax than one-half of one per cent. upon its annual net income; still, the State reserved the right (whether wisely or unwisely is not a question for the courts to decide) to withdraw that franchise
81 whenever in their judgment the public interest required it, without impairing the obligation of her contract with the company, as prohibited by the Constitution, for the reason that the company accepted the grant upon that condition; that was a part of the contract between the State and the company when it accepted the grant. (West End and Atlantic Street Railroad Company vs. The Atlantic Street Railroad Company, 49 Ga. Rep., 151.)

The Supreme Court of the United States fully recognized these general principles in Tomlinson vs. Jessup, 15th Wallace Rep., 454; Miller vs. The State, Ibid., 478; Holyoke Company vs. Lyman, Ibid., 500. In the case of Tomlinson vs. Branch, Ibid., 460, which was cited by the plaintiff in error, it was held by the court, in that case, that the act of the South Carolina legislature of 1843, authorizing the consolidation of

two railroad companies, withdrew the charter from the operation of the 41st section of the act of 1841 of that State, providing for the repeal or modification of charters granted by the State, and, therefore, that case does not contravene the rulings of that court in the other cases cited.

82 This charter of the company would have continued for thirty years from the date of its grant, and the right of the State to withdraw any of the franchises granted by it to the company is not expressly negatived in it. The reasons why the State did not negative her right to withdraw any of the franchises granted, do not appear. The general assembly may have thought that, inasmuch as the Central Railroad & Banking Company had enjoyed the exemption from taxation at a higher rate than one-half of one per cent. upon its net annual income, for many years, and being then abundantly able to take care of itself, and by the consolidation of another company with it thereby increasing its power and strength in the State for thirty years, that her interest required that she should reserve to herself the right to withdraw at least one of the franchises granted, whenever in her judgment the public interest should demand it. Whatever may have been the reasons which operated on the mind of the legislature for reserving this right of the State in making the grant, is not now

83 a question for the courts to determine. Although the State did reserve the right in making the grant to withdraw the franchise, it is not to be presumed that she would exercise that right captiously or unjustly, and it is not apparent that she has done so. The State has only exercised her sovereign power of taxation by taxing the property of the company as the property of the whole people of the State is taxed, and not otherwise, and cannot tax it otherwise under the provisions of the State constitution if she was disposed so to do.

It was insisted on the argument by the plaintiffs in error that, inasmuch as this court had decided in the case of the Mechanics' Bank vs. Heard, 37th Georgia Reports, 461, that a corporation could not voluntarily surrender its franchises to the State without the assent of the legislature; that it might be compelled to continue after its most valuable franchises had been withdrawn. The charter in that case was granted prior to the adoption of the code of 1863. This court

84 never has decided, and, perhaps, never will decide, that when the State withdraws any of the franchises granted to a corporation since the adoption of the code that such corporation cannot voluntarily surrender its franchises to the State, as provided by the 1686th section thereof.

The Southwestern Railroad Company occupies a different position in one respect from that of the Central Railroad & Banking Company. It appears from the evidence in the record that the act providing for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company, was passed in 1856, the 5th section of which declared that the act should not go into operation until there should be a vote of a majority of two-thirds of the stockholders of each company in favor of the union and consolidation and of the provisions of the act, which was not done until 1868, and the consolidation of the two roads did not take place until November, 1868. The act authorizing the consolidation of the two roads was not accepted by the stockholders thereof until 1868,

85 and did not become a contract between the State and the Southwestern Railroad Company until that time, which was subsequent to the adoption of the code in 1863. The contract was, therefore, con-

summated in view of the public law of the State as it existed at that time, and the exercise of the taxing power of the State, as provided by the act of February, 1874, did not impair the obligation of that contract, as provided by the Constitution of the United States.

What has been said in relation to the act consolidating the Macon and Western Railroad Company with the Central Railroad & Banking Company is also applicable to the act consolidating the Muscogee Railroad Company with the Southwestern Railroad Company.

The Augusta & Savannah Railroad Company was chartered by the general assembly of the State in 1838, before the adoption of the code of 1863. By the 13th section of its charter it is provided "that said railroad and the property of said company shall not be subject to be taxed higher than one-half of one per cent. on its annual income."

86 The defendant alleged in its affidavit of illegality to the execution issued against it by the State, reciting the exemption in its charter, that the act of 1874, under the provisions of which the execution against its property was issued, was unconstitutional and void, because it impaired the obligation of its contract made with the State on the statement of facts contained in the record. The counsel for the State demurred generally to the defendant's affidavit of illegality, which demurrer was overruled by the court, and the affidavit of illegality sustained.

When the State made the grant to the defendant contained in its charter and the same was accepted, it became an executed contract between the State and the defendant, and the State, under the law as it then existed, could not impair its obligation by withdrawing the franchise granted, as she attempted to do by the passage of the act of 1874; and, so far as said act was applicable to the defendant's franchise, as specified in the grant, exempting its railroad and property from a

87 higher rate of taxation than one-half of one per cent., it did impair the obligation of the contract, and, as to that contract, was unconstitutional and void, the State not having reserved the right to withdraw the franchise granted at the time the grant was accepted by the company.

After a careful examination of the questions made in the record, the conclusion is: 1. That the act of the 24th of August, 1872, consolidating the two railroad companies under the name and charter of the Central Railroad & Banking Company of Georgia, created a new corporation for the specific purposes as therein declared, and as no time was specified in the act for its continuance, it would not expire under the general law of the State until the end of thirty years from date of the act. 2. The fact that all the rights, privileges, immunities, and franchises of the Central Railroad and Banking Company, as specified in its old charter, were conferred by the act of 1872 upon the new company, those rights, privileges, immunities, and franchises were granted by the act to the new company in the same manner and have the same legal effect as if the same had been specifically enumerated in the body of

88 the new act, and when accepted by the new company were accepted in view of the provision of the 1682nd section of the code, and therefore the State reserved the right to withdraw the franchise as to the exemption from taxation, as she has done, and such withdrawal did not impair the obligation of her contract with the company, as prohibited by the Constitution of United States, and the same principles are applicable to the Southwestern Railroad Company.

Third. The Augusta & Savannah Railroad Company standing upon its original charter, as it was granted and accepted prior to the adoption

of the code of 1863, the State could not, by the act of 1874, withdraw any of the franchises granted to that company without impairing the obligation of her contract with it, she not having reserved the right to do so when the contract was made. The 1682nd section of the code of 1863, not being a part of the public law of the State at that time, did not enter into and constitute any part of the contract between the State and that company.

89 Let the judgment of the court below in the three cases mentioned in this opinion be affirmed.

Concurring opinion of McCay, J.:

1. Under section 1636 of the code of 1863, which is in these words: "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter;" and under section 1640, which is in these words: "A corporation may be dissolved by a voluntary surrender of its franchises to the State," it is competent for the legislature to alter any charter granted since the 1st of January, 1863, unless that right be expressly negatived by the charter, or it may withdraw any portion of the franchise, leaving it to the corporation to continue or to surrender at its pleasure.

2. Under the original charters of the Central Railroad Company and the Southwestern Railroad Company, the latter passed in , and the former in , they were both exempted from taxation by the

90 State, except to the extent of ½ of one per cent. upon the annual net income, and under said charter such exemption was irrepealable by the legislature.

3. The legislature, on August 24th, 1872, passed an act "to authorize and provide for the union and consolidation of the Macon and Western Railroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company, and for other purposes therein named." It was provided by said act,

"That the Macon & Western Railroad Company and the Central Railroad & Banking Company of Georgia be, and they are hereby, authorized and empowered to unite and consolidate the stocks of said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said Central Railroad and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad

91 Company shall be entitled to and receive an equal number of the shares of the capital stock of the consolidated company."

Sec. 2 provided that the act should not take effect until two-thirds of the stockholders of each company should consent.

Sec. 3 provided that on such assent the respective directors of said roads should complete the union and consolidation, and should certify the same, under the corporate seal of the companies, to his excellency the governor, to be filed in the office of the secretary of state.

The consent of the stockholders was given, and the consolidation completed and the certificate filed as provided.

Held that the act of August, 1872, was, in all essential ingredients, the creation of a new corporation, with the rights, privileges, and immunities of each of the old ones, but that said rights, privileges and immunities were and are held and enjoyed under the act of August 24th, 1872, and not under the original charters of the several companies.

92 4. That the necessary and legal effect of the filing of the

certificates of consent and consolidation, in the office of the secretary of state, was the surrender of the several charters of the two roads to the State and the acceptance of the new charter of the consolidated company, as the tenure & measure of the rights and privileges of the consolidated company.

5. The charter of the Central Railroad and Banking Company, to wit, the original Central Railroad and Banking Company and the Macon and Western Railroad Company, consolidated by the act of August 24th, 1872, under the name of the Central Railroad and Banking Company, is a private charter, granted since the 1st of January, 1863, and the company holds its franchises under section 1626 of the code of 1863, there being nothing in the charter expressly negativing the right of the State to withdraw the franchises therein granted.

6. By the act of 1850, entitled "An act to authorize or provide for the union and consolidation of the Muscogee Railroad Com-
93 pany with the Southwestern Railroad Company, under the charter of the latter company, it is provided, 1st. That upon a vote of a majority of two-thirds of the two companies, it should be lawful to unite and consolidate the two companies into one, under the charter of the Southwestern Railroad Company; that the name and style of the new company should be and continue "The Southwestern Railroad Company;" that the act should go into operation when, and not until, there shall be a vote of a majority of two-thirds of the stockholders, in amount, of each company, in favor of this union or consolidation, certified under the corporate seals of said companies, respectively, to his excellency the governor of this State. The vote was had and the consolidation effected and certified in November, 1868.

Held, that whilst the Southwestern Railroad Company, as constituted under the act of 1850, which did not, by its terms, go into effect until the certificate of a consent of two-thirds of the stockholders was filed in November, 1868, has, under the charter consolidating the
94 Southwestern and Muscogee Railroad Companies, all the rights of either of said two companies, yet it holds them under the law as it stood at the time its charter of consolidation took effect, to wit, in the year 1868, and is a private charter, granted since 1st January, 1863, and is subject to the provisions of section 1656 of the code of 1863.

6. The tax act of 1874, taxing the property of the several railroads of this State, as the property of other citizens of this State is taxed, is a withdrawal of any franchises of exemption from taxation to any railroad company chartered, or holding its franchises under any law, passed since the 1st of January, 1863.

95–102

103 STATE OF GEORGIA, *ss:*

To the honorable Hiram Warner, chief-justice of the supreme court of Georgia:

The petition of the Southwestern Railroad Company, a corporation existing under the laws of said State, respectfully sheweth that at the January term, in the year of our Lord one thousand eight hundred and seventy-five, of the said supreme court, there came on to be heard the cause of your petitioner, plaintiff in error, against The State of Georgia, defendant in error; that said cause had originated in an affidavit filed in behalf of your petitioner, setting forth that an execution which had been issued by the comptroller-general of the State of Georgia against

your petitioner for the sum of twenty-eight thousand two hundred and three dollars and twenty-nine cents, was proceeding illegally in this, that said sum of money was alleged to be due by your petitioner as tax assessed under an act of the legislature of said State of Georgia, approved February 28th, 1874, entitled "An act to amend the tax-laws of this State so far as the same relates to railroad companies, and to de-
104 fine the liabilities of said companies to taxation, and to repeal so much of the charters of said companies respectively as may conflict with the provisions of this act;" and that the said act, in so far as it attempts to repeal any portion of the charter of your petitioner, or to impose another and greater tax than one-half of one per cent. on the annual net income of your petitioner, is void and of no effect, inasmuch as it is an act impairing the obligation of a contract, and therefore a violation of the first paragraph of the tenth section of the first article of the Constitution of the United States; that the issue as made by the said affidavit was tried before his honor the judge of the superior court of Fulton County, who rendered his decision in favor of the validity of the said statute as not being repugnant to the said Constitution, and thereupon your petitioner sued out its writ of error to the said decision to the said supreme court, which is the highest court of law or equity in the said State wherein a decision could be had in said cause; that on the 18th of June, in the year eighteen hundred and seventy-five, the said supreme court rendered its decision affirming the decision of the court below, and sustaining the validity of the said act or
105 statute of the said State of Georgia as not being repugnant to the Constitution and laws of the United States.

Your petitioner further shows that the said supreme court was upon the eve of adjournment on the day when the said decision was rendered, and that an order was taken withholding the remititur in the said cause, and thus postponing the final action of the court for the purpose of enabling your petitioner to sue out its writ of error in the said cause to the Supreme Court of the United States, to obtain the proper citation and to file the requisite bond.

Your petitioner further shows that it has been greatly endamaged by the said decision, and prays your honor to allow it a writ of error to the said the Supreme Court of the United States and the proper citation thereon, to the end that the error of such decision, if any there have been, may be duly corrected.

(Signed) JACKSON, LAWTON & BASSINGER,
" R. F. LYON,
For Petitioner.

106 (Indorsed :) Supreme court of Georgia. The Southwestern Railroad Company, plaintiff in error, vs. The State of Georgia. Copy. Petition for writ of error. Filed in office Aug. 4, 1875. Z. D. Harrison, Clk. S. C. Ga.

107–108

109 SOUTHWESTERN RAILROAD COMPANY,
Office, Macon, Ga., July 27th, 1875.

The supreme court of the State of Georgia having decided the case of The State of Georgia vs. The Southwestern Railroad Company on a tax-execution taken by writ of error from Fulton superior court against this company,

Resolved, that the counsel of this company are hereby requested and

instructed to take the necessary steps to transfer said case by writ of error to the Supreme Court of the United States, and that the president of this company is authorized to execute a bond for a supersedeas with the corporate seal attached, or that either of the counsel engaged in the case for this company be authorized to execute the bond in behalf of this company.

* * * * * * *

A true extract from the minutes of this company of this date.

[SEAL.] JNO. T. BOIFEIULLET,
Secty. & Treas.

110 UNITED STATES OF AMERICA,
State of Georgia:

Know all men by these presents that we, the Southwestern Railroad Company, and John E. Jones and William S. Holt, as sureties, are held and firmly bound unto the State of Georgia, in the full and just sum of fifty thousand dollars, to be paid to the said the State of Georgia, or its assigns, to which payment well and truly to be made and done we hereby bind ourselves and successors, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with the corporate seal of the said the Southwestern Railroad Company, affixed by authority of a resolution of a board of directors of that company, and with the individual seals of the said sureties, and dated this second day of August, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas, lately, at a term of the supreme court of Georgia, in
111 a suit depending in said court between the said the Southwestern Railroad Company, plaintiff in error, and the State of Georgia, defendant in error, judgment was rendered against the said the Southwestern Railroad Company, and the said the Southwestern Railroad Company having obtained a writ of error to said Supreme Court, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation issued to the said the State of Georgia citing and admonishing said State to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of October next:

Now, the condition of the above obligation is such, that if the said the Southwestern Railroad Company shall persecute said writ of error to effect, and answer all damage and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. S. HOLT,
President So. W. R. Rd. Company.
J. E. JONES. [SEAL.]
WM. S. HOLT. [SEAL.]

Attest:
[SEAL.] JNO. T. BOIFEMLLET,
Sect'y and Treas.

112 Signed, sealed, and delivered in presence of—
S. M. FARRAR,
Not. Pub.

Personally appeared John E. Jones and William S. Holt, who each for himself makes oath and says that he is the surety on the within bond; that his signature thereto is in his own proper handwriting; and that he is worth the amount of fifty thousand dollars over and above

all his debts, liabilities, and contracts, and the amount of homestead and personalty exemption allowed by law.

J. E. JONES.
WM. S. HOLT.

Sworn to before me this second day of August, 1875, in Bibb County, Ga.
[SEAL.]

S. M. FARRAR,
Not. Pub.

The annexed and foregoing bond examined and approved by me this 2d day of August, 1875.

HIRAM WARNER,
Chief-Justice Supreme Court of Georgia.

(Indorsed:) Supreme court of Georgia. The Southwestern Railroad Company, J. E. Jones and W. S. Holt, to The State of Georgia. Copy. Bond for supersedeas on writ of error. Filed in office Aug. 4, 1875. Z. D. Harrison, clk. S. C., Ga.

113 UNITED STATES OF AMERICA, *ss:*

To the State of Georgia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the of next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein The Southwestern Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Warner, chief-justice of the supreme court of Georgia, this fourth day of Aug., in the year of our Lord one thousand eight hundred and seventy-five.

Z. D. HARRISON,
Clk. S. C. Ga.

HIRAM WARNER,
Chief-Justice Supreme Court of Georgia.

114 (Indorsed:) Supreme Court of the United States. Filed in office Aug. 4, 1875. Z. D. Harrison, clk. S. C. Ga. The Southwestern Railroad Company, plaintiff in error, vs. The State of Georgia, defendant in error. Citation. James M. Smith, gov'r of Georgia.

I acknowledge due legal service of the within citation, & waive copy. 7 Aug., 1875.

N. I. HAMMOND,
Atty.-Gen. of Ga.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Georgia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between the Southwestern Railroad Company, plaintiff in error, and the State of Georgia, defendant in error, wherein was drawn in question the validity of a statute of the State of Georgia on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in

favor of such its validity, a manifest error hath happened, to the great damage of the said the Southwestern Railroad Company, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same
116 at Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the second day of August, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

A. E. BUCK,
Clerk.

SUPREME COURT-ROOM,
Atlanta, Ga., 2nd August, 1875.

The above and foregoing writ of error allowed by—

HIRAM WARNER,
Chief-Justice Supreme of Georgia.

(Indorsed:) Supreme Court of the United States. The Southwestern Railroad Company, plaintiff in error, vs. The State of Georgia, defendant in error. Writ of error to the supreme court of Georgia. Filed in office, Aug. 4, 1875. Z. D. Harrison, clk. S. C. Ga.

117 CLERK'S OFFICE SUPREME COURT OF GEORGIA,
Atlanta, August 23, 1875.

I, Z. D. Harrison, clerk of the supreme court of the State of Georgia, and as such keeper of the records thereof, do hereby certify that the foregoing pages, hereto attached, contain true and complete copies of the original bill of exceptions and transcript of the record from the court below, and of the judgment and opinion of the supreme court of Georgia, and also of the petition for writ of error to said supreme court, and of the bond for supersedeas on said writ of error, together with the original citation and original writ of error to said supreme court, in the case of The Southwestern Railroad Company, plaintiff in error, *vs.* The State of Georgia, defendant in error, as appears from records now of file in this office.

Witness my signature and the seal of said supreme court, affixed the day and year above written.

Z. D. HARRISON,
Clk. S. C. Ga.

I hereby certify that the above attestation is in due form, this 24 day of August, 1875.

HIRAM WARNER,
Chief-Justice S. C. Ga.

(Indorsement on cover:) No. 578. The Southwestern Railroad Company, plaintiff in error, *vs.* The State of Georgia. Georgia sup. court. Filed 8th September, 1875.

2 660-676

In the Supreme Court of the United States.

The Central R. R. and Banking Co. of Georgia,
Plaintiff in Error.

VS.

THE STATE OF GEORGIA.

The Southwestern Rail Road Company,
Plaintiff in Error.

VS.

THE STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF OF PLAINTIFFS IN ERROR.

A. R. LAWTON,
Counsel for Plaintiffs in Error.

GEO. N. NICHOLS, PRINTER, BAY ST.

In the Supreme Court of the United States.

The Central R. R. and Banking Co. of Georgia,
Plaintiff in Error,
VS.
THE STATE OF GEORGIA.

The Southwestern Rail Road Company,
Plaintiff in Error,
VS.
THE STATE OF GEORGIA.

ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF OF PLAINTIFFS IN ERROR.

The principles involved in these two cases are so nearly the same, and the two companies interested are so closely allied, that they were argued and decided together in the State Courts. The payment of a tax imposed on Rail Road Companies, by the Act of the General Assembly of Georgia, of February 28, 1874, is resisted by the Plaintiffs in Error, on the ground that by their respective Charters they were permanently protected against the payment of any higher or

greater tax than *one half of one percentum upon annual net income*, and that this Act, so far as it proposes to levy a higher and different tax upon these Companies is unconstitutional and void—in conflict with the Constitution of the United States, being an Act impairing the obligation of contracts. The 18th Section of the Charter of the Central Rail Road and Banking Company, passed Dec. 14, 1825, is as follows:

"The said Rail Road and the appurtenances of the same shall not be subjected to be taxed higher than one half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said Company, but may tax any property, real or personal of said Company within the jurisdiction of said corporation, in the ratio of taxation of like property." (Printed record p. 13, 14.)

This Charter is without limit as to time, except as to the *exclusive* right to maintain a railway between certain points therein named. (Printed record p. 14, 15.) After twenty-five years the Legislature might charter another railway between same points. From the passage of this Act of incorporation in 1835, to the passage of the Act of 1874, this language was held sufficient by all the Departments of the Government of Georgia, to create and keep in existance the exemption now claimed by us.

On February 28, 1874, the Legislature of Georgia passed an act, the 1st section of which reads as follows:

SECTION 1. *The General Assembly do enact*, that from and after the passage of this Act, the Presidents of all the Rail Road Companies in this State shall be required to return, on oath, annually, to the Comptroller General, the value of the property of their respective Companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the peo-

ple of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller General.

If necessary at this late day to call attention to such well settled principles, it is submitted that these charters are *contracts.*

Dartmouth College vs. Woodward, 4 Wheaton, 418.
Binghampton Bridge case, 3 Wallace, 72 73.
Piqua Branch Bank vs. Knoop, 16 Howard, 369.
Young & Calhoun vs. Harrison, 6 Ga., 130.
Adkins vs. Thornton, 19 Ga., 325.
McLeod vs Burnsh 9 Ga 216

And the State cannot alter or impair them in any way, by any subsequent act of the Legislature, without the consent of the corporators—not even by a change of its *constitution.*

Wilmington R R. vs. Reid, 13 Wallace, 264.
Dodge vs. Woolsey, 18 Howard, 331.
Washington University vs. Rouse, 8 Wall, 442.
Jefferson Branch Bank vs. Skelley, 1 Black, 449.

Such exemptions are upon sufficient considerations.
Home of the Friendless vs. Rouse, 8 Wall., 437.

These exemptions were rightfully made by the Legislature, and are as much a part of the contract as any other clause in the Charter.

And every attempt to fix a different rate of taxation by a State without the consent of the other party to the contract has always been held to be void.

Humphries vs. Peques, 16 Wallace, 244-249.
Trask vs. McGuire, 18 Wallace, 392-404.
McChee vs. Mathis, 4 Wallace 143.

Wilson vs. Augusta Factory, 44 Ga., 397, and the cases already cited.

But it is contended that, admitting the above propositions to be true, the various *amendments* to the charters of these companies have so varied their relations to the State as to give to the latter a control over them which were denied to it in the original acts of incorporation;—in other words, that the additional powers and privileges granted by these amendments have subjected these corporations to the operation of Section 1682 and 1683 of the Code of Georgia.

These sections are as follows:

"§1682. *Private Charters.*—In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise unless such right is expressly negatived in the charter."

"§1683. *Heretofore granted.*—Private corporations heretofore created, without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State."

Sections 1684-5-6. Show how dissolved &c.

Admitting for the present that these sections of the Code of Georgia have been part of the Statute Law since January, 1863, we deny that either of the Companies now before the Court belongs to the class there referred to. with "Charters hereafter granted," but insist that they are both among "corporations heretofore created," and therefore "not subject to dissolution at the will of the State."

It is scarcely contended that a mere *Amendment* would constitute a new corporation.

Amendment does not affect Charter or rights of the Corporation beyond what it proposes. anew

Hamilton vs. Kutte, 6 Bush, Ky., 458.
Grant on Corporations, 24, 25, 46, 47.
Johnson vs. Crawley, 25 Ga., 316, 394.
P. & W. R. R vs. Maryland, 10 How 376.

But what are called the Acts of "Consolidation" are relied on to place Plaintiffs in Error in this category.

The Act of August 24th, 1872, which provides for the "consolidation of the Macon & Western Rail Road with the Central Rail Road and Banking Company of Georgia, under the name and Charter of the latter Company" is relied on to bring the Central Company under the taxing power of the Legislature, and strip it of all exemptions given in its Charter, which Act is as follows:

AN ACT to authorize and provide for the union and consolidation of the Macon and Western Rail Road Company with the Central Rail Road and Banking Company of Georgia, under the name and charter of the latter company, and for other purposes therein named. Approved August 24th, 1872.

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, That the Macon and Western Rail Road Company and the Central Rail Road and Banking Company of Georgia be, and they are hereby authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies under the name and charter of the said The Central Rail Road and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the Capital Stock of the Macon and Western Rail Road Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated company: Provided, That nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into, but that all such contracts shall be assumed by and be binding on the Central Rail Road and Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last mentioned company: And provided further, That, upon such union and consolidation, the capital stock of the Central Rail Road and Banking Company of Georgia shall not exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon and Western Rail Road Company added thereto.

SEC. 2. Be it further enacted, That such union and consolidation as is herein provided for shall not take place until at least two-thirds of the stockholders of each of said rail road companies (estimated by the number of shares held by each) shall have assented thereto, either in stockholders' meeting, called for that purpose by said companies, respectively, or by written authority to the directors by the stockholders, representing at least two-thirds of the stock of each of said companies.

SEC. 3. Be it further enacted, That when it shall be ascertained in the manner herein provided, that at least two-thirds of the stockholders of each of said companies have assented to such union and consolidation, it shall be the duty of the board of directors of each of said companies, respectively, to complete said union and consolidation, and to certify the same under the corporate seals of said companies, respectively, to his excellency the governor of this State, to be filed in the office of the secretary of state.

SEC. 4. Be it further enacted, That, upon the union and consolidation herein provided for, each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a shareholder in the Central Railroad and Banking Company of Georgia, for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the same rights, privileges, and benefits as attached to the holders of stock now held by the shareholders in said companies, or either of them.

SEC. 5. Repeals conflicting laws.

(Printed Record, page 27, 28.)

"Where two Rail Road Companies are consolidated, the presumption is that each of the two united Roads will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed."

Tomlinson vs. Branch, 15 Wallace 460.

Rail Road Co. vs. Harris, 12 Wallace 65-82.

Tomlinson v Jessup 15 Wallace 454,

Paine vs. Lake & L. R. R., 31 Ind. 283.
Holyoke Co. vs. Lyman, 15 Wallace 500-516.
Commonwealth vs. Essex Co., 13 Gray 239.
Code of Georgia §6.

This Act of consolidation puts out of existence the *Macon & Western Rail Road Company*, but preserves in full force, *by its name and Charter*, "The Central Rail Road & Banking Company of Georgia,"—the creation of the Act of 1835—the legal entity, the artificial person of thirty-seven years, its identity, which consists in a continuation of the same life communicated under the same organization, in no wise lost or impaired; its rights, privilegs, immunities, franchises, exemptions, never ceasing to exist for one moment since the passage of the Charter in 1835. Additional powers are conferred, and a larger scope given to its useíulness, but not one single privilege, right, immunity, or exemption, taken away.

It was competent for the Legislature to say it would not amend the Charter, or pass an Act for consolidation, unless this Company would consent to place its whole Charter under §1682 of the Code of Georgia. The acceptance of such terms by the corporation would have accomplished what the State now claims. But no such terms were offered or accepted.

Under the circumstances, the Act of 1872 was not the grant of a new charter. It was, at most, but a mere modification of the old.

Tomlinson vs. Branch, 15 Wallace 465.
19 Ill. 176.
1 Amer. Cor. Cases 351.
Johnson vs. Crawley, 25 Ga. 316.

"A corporation is an artificial person created by law for specific purposes, the limit of whose *existence*, powers and liabilities is fixed by the Act of Incorporation called its "charter."

Code of Georgia, §1670.

The Act of 1872 contains none of these elements. All of them are "fixed" by the original charter. The sphere of usefulness of this corporation was simply extended to accomplish more thoroughly the object set forth in the Act of 1833, and repeated in the Charter of 1835: "for the purpose of opening a canal or rail-road communication from the City of Savannah to the interior of the State."

(Printed Record, page 7.)

This Act was a mere permission for one Rail Road to sell and transfer on terms, unlimited as to time, unqualified and absolute—permission to one Rail Road to purchase another, and to pay for it in stock.

Both Companies having the exemption, it continued unimpaired by the purchase. And even though the Macon & Western had no exemption or limit of taxation, the State contracted with *its* stockholders that *they* should have the "*name and Charter*" *of the Central Rail Road & Banking Company of Georgia*, with all its rights, privileges, immunities, and franchises for *their* protection against taxation. This was a *contract* with a legal entity then recognized and known—an artificial person created in 1835, and in existence ever since—a party capable of making a contract, the obligation of which may not be impaired.

But by the amending Act of February 9, 1869, of the Macon & Western Rail Road, it was provided "that such additional stock as may be issued, as well as the present stock of said Company, shall hereafter pay the same annual tax to the State as the other Rail Road Companies of this State now do, viz: one half of one per cent. on the amount of net income."

(Printed Record page 28.)

If in any sense then a new Charter, the Act only contains the grant of those franchises created by it. Those contained in the old Charter are not created or granted anew.

The acceptance of such an Act of consolidation, or authority to purchase, is not a surrender of any right or franchise before granted.

1 Kyd. 234 Note.

This view is strengthened by the language used by the Legislature in the preamble to the Act of February 20th, 1873, (printed record 28,) "to increase the number of Directors of the Central Rail Road, &c." The language is, "Whereas, the recent union and consolidation of the Macon and Western Rail Road Company with the Central Rail Road and Banking Company of Georgia, under the name and charter of the latter Company, has largely *increased* the capital stock and the number of stockholders of the said last named Company: Therefore, &c., &c." *What Company* was this, whose capital stock and number of stockholders had been increased? A company brought into existence August 24, 1872? clearly not. But a Company, an entity, an artificial person, long before that time in being, with a capital stock and stockholders to be "largely increased" by the operation of that Act upon *it*.

But if the Court should be of the opinion that §1682 of the Code does apply to the grants made by the Act of 1872, then we submit that the State can "withdraw" only what it *then* granted, to wit: *the authority for the union and consolidation of the Macon and Western with the Central Rail Road*. That was the "charter hereafter granted" (if any), in the eye of that section of the Code.

For the purposes of this part of the argument, let it be admitted, that the entire charter of 1835 was so reenacted in 1872 as to lay open its provisions to §1682. Did the State reserve the right to withdraw the *privileges and immunities* granted, and leave the *burdens*

imposed by that charter still to be borne? The right reserved is to "withdraw *the* franchise"—clearly *the right to be a corporation.* The word "franchise" there certainly cancels the word "charter." There is no reservation of the right to change, alter or amend, but only to "withdraw." And in this respect the reservation differs materially from every similar provision in other States which has been discussed and passed upon by this Court. They all provide for change, alteration, amendment, as well as repeal or withdrawal.

Atlanta Street R. R. case, 49 Ga., 151.
Tomlinson vs. Branch, 15 Wallace, 461.

And this view of the case is further strengthened by the fact that the Supreme Court of Georgia has decided, that a corporation cannot voluntarily surrender its franchises to the State, without the assent of the Legislature; and thus might be compelled to bear the burdens imposed, after its most valuable privileges had been withdrawn.

Mechanics Bank vs. Heard, 37 Ga., 461.

It is not always true in law or morals, as it is in mathematics, that the whole includes all its parts, or that the greater includes the lesser. The burdens and privileges, the good and the bad, may be so commingled, that a much more serious wrong may be committed in destroying *by selection*, than in destroying *the whole.* The right to take *life* by hanging does not include the right to lop off limb after limb, and still leave capacity for a languishing existence!

It is true that the Supreme Court of Georgia, when confronted, in this case, with its decision in 37 Georgia, endeavors to escape from the inconsistency by saying: "This Court never has decided, and *perhaps* never

will decide, that when the State withdraws any of the franchises granted to a corporation since the adoption of the Code, that such corporation cannot voluntarily surrender its franchises to the State." But the Court declared the law of Georgia to be that "the surrender must be accepted by the government, and be made by some solemn act to render it complete."

37 Georgia 417.

If that was the law of Georgia then, it is the law now. There is no escape from it.

The strong inclination of that Court to fix the new tax upon this class of Rail Roads is clearly manifested in the more recent case of the A. & G. R. R. vs. The State, not yet reported, where Judge Bleckley says: "Whatever power legislative bodies may have in other States to part with or limit the essential prerogatives of sovereignty, no such power exists, *or ever has existed*, in the General Assembly of Georgia. Consequently all exemptions from the common burdens hitherto granted by statute to corporations, or others, ought to be construed as privileges only, and as revocable at the will of the Legislature." This is a direct repudiation of all the decisions on this question, from *Dartmouth College Case* to the present time; and represents the true inclination of that Court in the premises.

The case of the South Western R. R. is even much stronger for the Plaintiffs in Error than that of the Central Rail Road.

The limit on the power to tax that Company is fixed by Section 14 of the Charter of December 27, 1845:

"The said railway and its appurtenances, and all property therewith connected, shall not be taxed higher than one-half of one per cent. upon its annual net income."

(Record, p. 6.)

The 5th Section of the Charter of the Muscogee Rail Road, of December 27th, 1845, contains the following: "The capital stock of the said Rail Road Company shall not be taxed by the State higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on the stock of said Company."

Such language has been held by all the courts sufficient to limit taxation on property as well as capital stock and income.

Rome Rail Road vs. Mayor, 14 Ga., 275.
Ordinary vs. Central Rail Road, 40 Ga., 650.
City Council vs Ga. R. R., 26 Ga., 651.

But the right to impose the tax is claimed in consequence of the Act of March 4, 1856, (Record, p. 14,) under which the Muscogee Rail Road was united and consolidated with the South Western Rail Road, in November, 1868.

An Act to authorize and provide for the union and consolidation of the Muscogee Rail Road Company with the South Western Rail Road Company, under the charter of the latter Company.

SECTION 1. Be it enacted, &c., That upon a vote of a majority of two-thirds of the stockholders, in amount, in the aforesaid Companies respectively, in favor of the union and consolidation of the Muscogee Rail Road Company, its franchises and property, with the said South Western Rail Road Company, under the charter of the last mentioned Company, on such terms as the said Companies may respectively agree, it shall be lawful so to unite and consolidate the said two Companies into one, under the charter of the South Western Rail Road Company.

SEC. 2. And be it further enacted, That upon such union and consolidation the capital stock of the South Western Rail Road Company shall not exceed the amount of the present authorized capital thereof and the present authorized capital of the Muscogee Rail Road Company.

SEC. 3. And be it further enacted, That upon such union and consolidation as is hereinbefore provided for, the holders of stocks in the Muscogee Rail Road Company shall surrender their certificates of stock to the South Western Rail Road Company and receive in lieu thereof certificates of stock in the South Western Rail Road Company, to such an extent and amount as the said two Companies may agree on; and thenceforward all the rights, privileges, and property of the said Muscogee Rail Road Company shall be part and parcel of the said South Western Rail Road Company, and all the chartered rights and privileges of the South Western Rail Road Company be extended over the track and line of the Muscogee Rail Road Company, and everything appertaining thereto; the name and style of the consolidated Company shall be and continue "The South Western Rail Road Company."

SEC. 4. And be it further enacted, That upon the union and consolidation of said Companies, all the debts and liabilities of the Muscogee Rail Road Company shall be assumed and paid by the South Western Rail Road Company.

SEC. 5. And be it further enacted, That this act shall go into operation when, and not until, there shall be a vote of a majority of two-thirds of the stockholders, in amount of stock of each of said Companies, in favor of this union and consolidation, and of the provisions of this act, certified under the corporate seals of said Companies, respectively, to his excellency the Governor of this State.

SEC. 6. And be it further enacted, That if, from any cause, the union and consolidation of the said Companies hereinbefore provided for shall not take effect, then it is hereby declared that nothing herein contained shall affect, alter, or change in any way the present existing rights of the said Companies, respectively.

Approved March 4th, 1856.

All that has been said to prove that the Central Rail Road did not lose its exemption by the act, or the fact, of consolidation, applies to the South Western Rail Road, and with tenfold greater force—for there is

no pretence that the Legislature passed any act, or did anything whatever, to bring about this result, *after* §1682 *of the* Code became part of the law of Georgia, or *after* the constitution of 1868 was adopted. *Both* of these Companies had charters with exemptions from the tax now sought to be imposed, and no franchise or privilege of any kind was granted later than 1856.

That Act was not a new charter, even if bearing date November, 1868.

Grant on Corporations, 24, 25, 46-7.

Johnson v Crawley 25 Ga., 316.
10 How, 376.

As soon as the terms of union and consolidation were complied with, the result was governed by laws in force at the time when the consent to the transfer of one Rail Road to the other was given by the Legislature. The whole transaction relating back to that time as in wills, attainder, bargain and sale under statute of uses, &c.

2 Comyn's Digest, p. 707. Title "Chancery."
Potter's Dwarris "on Statutes," 163, 167.
Ashburnham vs. Bradshaw, 2 Atkins, 35.
State vs Boosa, 11 Ohio, 16.
Carrol vs. Carrol, 16 Howard, 275.

The provision in the constitution of 1868, (Declaration of fundamental principles, section 27,) "taxation on property shall be *ad valorem* only, and uniform on all species of property taxed," does not affect this question. These charters having been already granted under a prior constitution, we have seen that they could not be varied without the consent of the corporation, even by a change in the fundamental law—a new constitution. Being artificial persons *then*

in being, capable of contracting and being contracted with, the State could contract with them and they with the State, for any changes in their privileges or immunities—for any extension or contraction of their sphere of usefulness, or removal of complications in their mode of working,—without changing one tittle of the relations of these persons to the State, in other respects. Taxation shall be *ad valorem* only, and uniform on all species of property taxed, *except where the previous contracts* of the State *or the obligation thereof would be thereby impaired.* And that sentence in the constitution must be read, with these words added, when applied to such charters as we are now discussing. As to these companies, the power of taxation must be exercised as before the adoption of the new constitution—or, if that be forbidden, *then not at all.* The contract with the State does not *require* a tax up to one half of one per cent. but that it shall not be "*higher* than one half of one per cent. upon its net income."

This section of the new constitution has been construed by the Supreme Court of Georgia in

Kenny vs. Harwell, 42 Ga., 416.
Burch vs. Mayor of Savannah, 42 Ga., 596.
Wilson vs Augusta Factory, 44 Ga., 388.
City of Augusta vs. National Bank, 47 Ga., 562.

And where the State is not bound to refrain by its previous contracts, still it is held that this constitution does not prevent the Legislature from exempting entirely from taxation any one species of property.

This right of exemption has been repeatedly exercised by the Legislature since the adoption of the Constitution of 1868.

Cotton and Woolen Manufactures exempt under certain conditions.

Act of Aug. 27, 1872.

Same Act applied to Iron Furnaces and the Manufacture of Iron.

Act of Feb. 19, 1873.—Acts of 1873, p. 67.

The Act of February, 1876, relieves the Brunswick & Albany Rail Road from the provisions of *this very tax Act* against Rail Roads.

Public Acts of 1876, p. 55.

Whatever may have been the decisions of State Courts on any of the questions here discussed, in any step of the argument, the decisions of *this Court* must control, as the duty is assigned to it of protecting the sacredness of contracts.

Jefferson Branch Bank vs. Skelly, 1 Black, 436.

Carrol v Carrol 16 Howard 275 284.

But we submit finally, that Section 1682 of the Code has never been any part of the law of Georgia. The Act of December 9, 1858, provided for the appointment of three Commissioners "to prepare for the people of Georgia a Code, which should, as near as practicable, embrace, in a condensed form, the laws of Georgia, whether derived from the Common Law, the Constitutions, the Statutes of the State, the decisions of the Supreme Court, or the Statutes of England, of force in this State."

The Act of December 19, 1860, adopts the Code prepared *under the Act of* 1858.

The joint Committee of the General Assembly, appointed to examine the manuscript, in their Report say:

"If the new Code now presented were a new system of jurisprudence, or had the Commissioners attempted to graft upon our system any new features extracted from others, and unharmonious with our own, or even if alterations in a well-defined public policy had been

attempted, your Committee would have paused, hesitated to recommend the mode of adoption suggested, without at least calling the special attention of the Legislature to such new and essential changes."

On that Report the adopting Act of 1860 was passed —and if there was anything in the mass of manuscript called "The Code," which was inconsistent with that Report it operated as a *fraud*.

If there was anything *new* in the Code—if this was an original Statute—it could not become the *law* of the State of Georgia unless it was read three times on separate days, in each branch of the General Assembly—under the Constitution then in force. All this is set forth at large in the "Preface" to the Code of 1873, pages 3, 4, 5 and 6.

In 37 Ga., 412—Mechanics Bank vs. Heard—the Supreme Court of Georgia say "It should be kept in mind that the codifiers were commissioned to embody the principles of the Common Law in force in Georgia; they had no authority to originate new matter for legislative sanction. It therefore is incumbent on those who assert that they went beyond their commission, and especially in reference to the subject of dissolution of corporations, to *prove it*."

We "prove it" by the assertion of the Supreme Court itself in 49 Ga., 158, "This section of the Code introduced *a new element into the law of private corporations in this State*, and all charters granted by the State to private corporations since its adoption are subject to its provisions."

Nor is this affected by the Constitution of 1865.—That only adopts the adopting statute of 1860. Whatever the latter failed to make *law*, that Constitution did not touch.

A R. LAWTON,

Counsel for Plaintiffs in Error.

Supreme Court of the United States.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA

against

THE STATE OF GEORGIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of Georgia. Its object is to review the decision of that court rendered against the plaintiffs in error upon the question whether an act of the General Assembly of Georgia, passed in 1874, impairs the obligation of a contract between the state and the company.

In 1833 the Central Railroad and Canal Company of Georgia was incorporated for an unlimited period with power to make a railway or canal from Savannah to Macon, with this provision, that "the said canal or railway and the appurtenances of the same shall not be subjected to be taxed higher than one-half per cent. upon its annual net income."—(fol. 13.) By an act in 1835, the name of the company was changed to the Central Railroad and Banking Company of Georgia, and its powers

were enlarged with the following provision: "the said railroad and the appurtenances of the same shall not be subjected to be taxed higher than one-half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of the said company, within the jurisdiction of said corporation, in the ratio of taxation of like property."—(fol. 44.)

In 1859 another act was passed to authorize the consolidation of the stock of Milledgeville and Gordon Railroad Company and of the Eatonton Branch Railroad with the stock of the Central Railroad and Banking Company, containing a provision "that the additional capital stock in the said Central Railroad and Banking Company of Georgia, authorized by this act to be issued and disposed of, shall be subject and liable to pay the same rate of tax to the State of Georgia that is or shall be required of the citizens of this state on their property." --(fol. 78.)

The Macon and Western Railroad Company was incorporated in 1847 for the construction of a railway from Macon to Atlanta, without any special privilege in respect to taxation, and none was afterwards made until 1869, when an act was passed for the increase of its capital, with a provision, "that such additional stock as may be issued, as well as the present stock of said company, shall hereafter pay the same annual tax to the state as the other railroad companies of this state now do, viz: one-half of one per cent. on the amount of the net income."

Various acts were passed at different times, amending the charter of the Central Railroad and Banking Company, and among them the one already mentioned, passed in 1859, by which the stock of the Milledgeville and Gordon Railroad Company was consolidated with the stock of the Central Railroad and Banking Company, as a condition of which it was provided that the Central

Company should pay the state twenty thousand dollars for its stock in the former company.—(fol. 76.) Another, passed on the 20th of August, 1872, reciting that "whereas the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Macon and Western Railroad Company, have each issued and disposed of bonds which will shortly mature, and should be provided for, and said companies also desire to make important improvements and provide additional facilities for transportation and travel, which will require the use of their credit to provide the necessary means for the same, and whereas the two last mentioned railroads have been leased by the Central Railroad and Banking Company of Georgia, thus uniting the interests of the three said railroads," and authorizing the issue of the joint and several bonds of the three companies "to the extent of $5,000,000, of such denomination and bearing such rate of interest, and payable in gold or currency, as the respective boards of directors of said three railroad companies may or shall decide, the decision of the board of directors of each of said three railroad companies being necessary, before the issue or disposal of any of the joint and several bonds hereby authorized;" it being also provided that such bonds might be secured by mortgages of the property.—(fol. 89.)

Four days after the passage of this act, another was passed "to authorize and provide for the union and consolidation of the Macon and Western Railroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company," which declared that the two companies "were authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said The Central Railroad and Banking Company of Georgia, in such manner that each and every owner

and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated company: Provided, That nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into, but that all such contracts shall be assumed by and be binding on the Central Railroad and Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last-mentioned company: and Provided further, That upon such union and consolidation the capital stock of the Central Railroad and Banking Company of Georgia shall not exceed the amount of the authorized capital thereof and the present authorized capital of the Macon and Western Railroad Company added thereto."—(fol. 94.)

In 1874 the General Assembly of Georgia passed an act "to amend the tax laws of this state, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charter of such companies respectively as may conflict with the provisions of this act," (fol. 109,) under which the plaintiffs in error were taxed that year to an amount of $46,000 and upwards, (fol. 2,) over and above the tax on net income, authorized and limited by the original charter.—(fol. 97.)

The authority to assess this additional tax is asserted under section 1636 of the Code of Georgia, which took effect in 1863, and is in these words: "In all cases of private charters hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."—(fol. 140.)

POINTS.

First. The imposition of the tax in question, being the excess over half per cent. on the net income, would im-

pair the obligation of the contract between the state and the company, if that contract has not been so far changed as to allow the imposition of the tax.

Second. The contract has not been changed in that respect and to that extent, for the reason, first, that the charter of the plaintiffs in error was *not granted after* 1863; and, next, that if it were to be deemed granted in 1872, the time of the consolidation, the act of 1874, imposing the tax, is not a *withdrawal* of the franchise.

The plaintiffs in error hold their essential franchises, not under the consolidation act of 1872, but in respect to their banking privileges and their railway from Savannah to Macon, under the charter of 1833, confirmed in 1835, and in respect to their railway from Macon to Atlanta, under the charter of 1847. The argument of the defendants in error must be that the company holds *all* its franchises under the act of 1872, for if it holds any under the original charter it must hold this of being exempt from taxation beyond a limited extent.

What, then, is the effect of the consolidation? The The answer to that question must depend upon the provisions of the statutes. Each case of the kind must be determined by its own circumstances. In the present case we submit that the intent of the legislature and of the stockholders of the two companies must have been that the charter of the Central Railroad and Banking Company was to be preserved, and especially so valuable a franchise as exemption from unlimited taxation was not to be given up.

Four days before the act of consolidation the separate companies, by separate corporate acts, were empowered to issue joint and several bonds to the amount of $5,000,000, and to mortgage their property respectively therefor. This act could hardly have been carried into effect without the continued existence of the respective corpo-

rations, but certainly it could not have been contemplated that capitalists were to be invited to buy the bonds after the loss of so valuable a franchise upon which their security for repayment so much depended, and without which it might, indeed, become worthless. It is to be presumed that the act of consolidation was even then pending before the legislature, and that the two acts were parts of one general scheme.

Turning, then, to the act of consolidation, what do we find? Is there anything like a surrender to the state of all the franchises of the Central Railroad and Banking Company, and the grant of a new charter? The design and effect of the legislature were at the very most to enlarge the powers of the company so as to take in the Macon Company, and to merge the latter company in the former. The two companies were empowered to consolidate their stock, and their rights, privileges, immunities, property, and franchises. That does not look like a surrender or destruction of them. They were to consolidate them "under the name and charter of the said The Central Railroad and Banking Company of Georgia." That does not look like the surrender or destruction of the charter of that company. Neither company was to be discharged from any of its contracts that might require the corporate name of either company to be still used, and its separate rights and duties to be asserted. The liabilities of both were, indeed, cast upon the Central Company, but that was only an additional guaranty. Upon the union the capital of the consolidated company was not to "exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon and Western Railroad Company added thereto." There was no authorized capital thereof, unless the word "thereof" refers to the company, before the consolidation, as the same company that was to exist afterwards.

And lastly, upon the union, each stockholder of the Macon Company was to receive an equal amount of stock in the Central Company, but nothing is said about the stockholders of the Central Company surrendering their old certificates or receiving new ones. They were to remain as before, stockholders of the Central Company, with its enlarged powers.

But if this reasoning were thought inconclusive, and the act of consolidation were held to be in effect a surrender of the old charters and the granting of a new one, even then the tax in question would impair the obligation of the contract between the new company and the state. What would the charter then be? This, in express terms: you shall not be taxed beyond half per cent. on your net income. Would the reservation to the state in such case of "the right to withdraw the franchise" authorize it to take away this particular privilege without withdrawing the franchise altogether? Could the state require the company to run its railway and pay at the same time whatever tax it might choose to impose? The Supreme Court of Georgia answers this argument by saying, that the legislature might "withdraw any portion of the franchise, leaving it to the corporation to continue or to surrender it at its pleasure."

But is this a sound argument? Where is the right of the corporation to surrender its charter, because the state has taken away one of its franchises, if the right to take away one or more without taking all was reserved at the granting of the charter? In other cases the reservation has usually been of the right to repeal, modify, or amend. Are these latter expressions surplusage? Does the right to repeal amount to the same thing as the right to modify? How would it be in the case of a private contract? The right of one party to withdraw from a contract is often reserved. Nobody has ever yet supposed that this included the right to alter a particular provision of the contract without the consent of the other party.

We beg leave to refer to the following cases in support of the foregoing argument, or particular parts of it:

15 Wallace, 454, 460, 470, 478, 500.
16 " 244.
18 " 206 and 391.
19 " 241.
20 " 46.
21 " 492.

Upon the whole, we submit, that for one or both of these reasons, the judgment should be reversed.

JEREMIAH S. BLACK,
DAVID DUDLEY FIELD,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

No. 578.

The Southwestern Railroad Company

vs.

The State of Georgia.

BRIEF OF PLAINTIFFS IN ERROR.

J. S. BLACK,
A. R. LAWTON,
D. D. FIELD,
Of Counsel for Plaintiffs in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 578.

THE SOUTHWESTERN RAILROAD COMPANY

vs.

THE STATE OF GEORGIA.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

This, like the case of the Central Railroad and Banking Company, is a writ of error to the Supreme Court of Georgia. Its object also is to review the decision of that Court upon the question whether the levying of a tax of $28,000, and upwards, for 1874, in excess of half of one per cent. upon the net income is an infraction of the contract between the State and the Company.

In 1845, the Southwestern Railroad Company was incorporated by the General Assembly of Georgia, for the purpose of constructing a railway from Macon, a central town of the State, to the rivers flowing into the Gulf of Mexico, with power to fix the rates of tolls, (Folio 17,) and with a provision that " the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income, (Folio 19.)

At the same time the Muscogee Railroad Company was incorporated for the purpose of constructing a railway from Columbus to the Southwestern Railroad with a provision that "the capital stock of the said railroad company shall not be taxed by the State higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on the stock of said company;" and another provision "that the stockholders in said company shall be liable in proportion to the number of shares held by them respectively for the debts of said company which shall not exceed one-half of the capital stock thereof."

Various acts were passed from time to time amending the charters of these companies until March, 1856, when one was passed for their union and consolidation under the charter of the Southwestern Company.

This act declared that, upon the votes of two-thirds in amount of the stockholders of each, it should "be lawful so to unite and consolidate the said two companies into one, under the charter of the Southwestern Railroad Company," and that, "upon such union and consolidation, the capital stock of the Southwestern Railroad Company shall not exceed the amount of the present authorized capital thereof, and the present authorized capital of the Muscogee Railroad Company," "and thenceforward all the rights and privileges and property of the said Muscogee Railroad Company shall be part and parcel of said Southwestern Railroad Company, and all the charters, rights, and privileges of the Southwestern Railroad Company be extended over the track and line of the Muscogee Railroad Company, and everything appertaining thereto; the name and style of the consolidated com-

pany shall be and continue 'The Southwestern Railroad Company.'"

The consolidation thus authorized, though negotiations therefor were had before 1863, did not take place until November, 1868.

POINTS.

This case involves nothing new in the law, but the application of old law to new facts.

That a State cannot impair the obligation of a contract is clear; that a stipulation in the charter of a corporation excepting it from taxation makes a contract is also clear; that such a contract was made in 1845, with the Southwestern Railroad Company is moreover certain; that contract has not been ~~existing~~ either by the dissolution of one of the parties or the abrogation of the stipulation, unless that fact results from the consolidation of one company with another. The act of consolidation contained no express abrogation of the stipulation, nor did it declare the former company dissolved, and the only question then, is whether one of the parties to the original contract in 1845 has, by virtue of something not expressed but implied, ceased to exist; and a new corporation has been created in its stead with which a new contract has been made. If it has ceased to exist then there arises another question which is whether the obligation of the new contract with the new corporation would be impaired by the exaction of the new tax.

Leaving aside, then, all other questions than these two, let us discuss them.

If the corporation formed in 1845 has ceased to exist, it

is not from the lapse of time. A natural death did not terminate its life. (Folio 23.)

It was new legislation, and that only, which has terminated the corporate existence, if terminated at all. What new legislation has had this effect?

Does any and every alteration of the charter make in effect a new charter and create a new corporation. That cannot be, unless the United States are a different corporate body from what they were in 1789. We have taken in Louisiana by purchase, Texas by treaty, and California by conquest. France has remained the same corporation in all periods of her history. So has England, with or without America or India or Australia.

The doctrine of novation has no application to the case. The existence of the corporation being conceded, the question of novation as to its contracts might arise. But the present question is one of existence or non-existence.

This is a question of intent expressed in words. We ask, does the language used manifest clearly an intent to destroy the old corporation and create a new one? and if it does not, then we must gather the intent, if we can, from other sources.

Now, it appears to be clear that the State and the two companies did not contemplate a surrender of their old charter, with their valuable franchises, and the taking out of entirely new ones, and for the plain reasons that such an act would virtually defeat some of the most important objects they had in view.

I.

Such, certainly, was not their intention in respect to any of the amendments prior to March 4, 1856.

a. The act of 1847 did not make a new Southwestern Railroad Company.

b. Nor did either the act of February 11, 1850, or that of February 23, in the same year. So much is apparent from their several provisions.

II.

Nor was such the intention of the legislation of 1856.

At that time there was no law of Georgia which reserved to the State upon the charter of a corporation the right to withdraw the franchise. It is, therefore, certain that neither party then contemplated a change in the rights of the shareholders in that respect.

And when twelve years afterwards the consolidation under this act was carried into effect, the stock-holders could not have contemplated any such deterioration of their rights, because not only would their profits be endangered, but their liability for the debts of the company increased.

Folio, 35.

If the first question is answered in our favor, there will be no occasion to consider the second. But suppose the first answered the other way, should we stand upon the second question?

If a new corporation was created on the consolidation taking place, and a new contract was made with it, what was that contract in respect to taxation? The language used

was that the new corporation should have "all the rights, privileges, immunities, property and franchises belonging or attaching to" the old corporations. This language was as strong as if it had been put in these words: "The company shall be exempt from taxation beyond one-half per cent. on its income." How would the question then stand? A corporation, created in 1868, with an express engagement on behalf of the State that it shall not be taxed beyond the half per cent., the consideration of such engagement moving from the old stockholders being the surrender of the old franchises and the assumption of new burdens. Has a corporation thus formed, with such stipulations, no rights?

Can such an engagement be broken at will. The right to break it is asserted upon the strength of Articles 1651 and 1682 of the Code of Georgia. The first declares that artificial persons "are the creatures of the law, and, *except so far the law forbids* it, subject to be changed, modified, or destroyed." The second declares that "in all cases of private charters hereafter granted, the State reserves the right to *withdraw the franchise*, unless such right is expressly negatived in the charter."

Section 1651 has no application to the present case because the very question to be now considered is what the law forbids, and that depends upon the contract. The nature and extent of the contract is the only question, and to the ascertainment of that section 1682 alone is pertinent. Let us suppose the State and the Company to stand face to face. The State wants a service. The Company wants dividends. The State says to the Company, "you shall have this franchise of a railway from Macon to the Gulf rivers, with all that it implies, and such guarantee of dividends as that they

shall not be absorbed by taxes," and the Company says, "we, on these terms, will run the railway."

The reciprocal engagements are the compliment and consideration of each other.

When one of these parties, the State, takes advantage of section 1682 to repudiate this agreement what do we answer?

This is repudiation as much as the repudiation of Mississippi on the pretense that her bonds were issued in violation of the constitution of that State.

We answer:

1. That section 1682 will not justify the State because her engagement not to tax is, under the circumstances, equivalent to an express negative of the right to withdraw the exemption.

2. And again, because the withdrawal meant is an entire resumption of the franchise, not a partial one. A resumption by piece-meal is equivalent to taking away a part and compelling the Company to proceed with the residue, taking away the steam and obliging the ship to sail; taking off half the horses and obliging the carriage to travel with those that are left.

What warrant is there for this? The article of the code differs from most provisions on the same subject. Other constitutions and codes have the words "repeal, alter, or modify."

The right to take a part is not included in the right to take the whole, because the result would be different. If you take all, the corporation is gone and no service remains to be performed. If you take a part, the service remains

all the same. Rights and duties should be correlative. Suppose a similar stipulation to be made on behalf of the company; that is, suppose the company to reserve the right to surrender the franchise. That surely would not mean a right to abandon the road leading to Columbus, and keep the rest.

Suppose a contract between a steamship company and the Government to run a line of packets to Europe, carrying the mails, with a reservation of the right on the part of the company to withdraw the steamers; would that include the right to take off all but one?

We do not enter upon the question involved in the Granger cases, because they are still undecided, but we cannot help observing that all the considerations urged against the laws of Iowa and Wisconsin apply with greater force to these tax laws of Georgia.

It cannot have escaped the attention of a thoughtful observer that our legislation tends more and more every day to become agrarian. The enormous taxation in many places already amounts to confiscation. So long as they who have no property can vote away the property of others, the more the power is restricted and guarded the better.

The plaintiffs in error therefore assign as error in the judgment of the supreme court of Georgia—

1. That the said court erred in deciding that the act of the General Assembly of the State of Georgia, entitled "An act to amend the tax laws of this State so far as the same relates to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act," approved February 28, 1874, was

not a law impairing the obligation of a contract, as applicable to the charters of the plaintiffs in error.

2. In deciding that the qualified exemption from taxation conferred by the original charters of the plaintiffs in error no longer existed as a contract after the union and consolidation mentioned.

3. In deciding that these acts of union and consolidation operated as surrenders of the old charters, and the creation of new charters, bearing date at the time of such union.

J. S. BLACK,
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Of Counsel for Plaintiffs in Error.

STATEMENT OF FACTS

AND ARGUMENT FOR DEFENDANT IN ERROR,

Supereme Court of the United States.

No. 577.

THE SOUTHWESTERN RAILROAD CO., Plaintiff in Error,
vs.
THE STATE OF GEORGIA,

AND

No. 578.

THE CENTRAL R. R. & BANKING CO.
vs.
THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

FILED MARCH 1876.

ERRATA.

"Increase" at end of first paragraph, on 3d page, should be "income."

"Act of 1865," near middle of 9th page, should be "Act of 1856."

Sections "1642–1643," on 11th page, should be "1682–1683."

"August 25, 1872," on 20th page, should be "August 24, 1872."

"1969," on 27th page, should be "1869."

"1604," on 34th page, should be "1804."

"Other," on third line from bottom of 35th page, should be "of that."

"Exempt," in 11th line from top of 36th page, should be "except."

"Amend," on 3rd line from top of 40th page, should be "annul."

"Sametime," on 40th page, should be "same term."

"39th Ga. R." on 41st page, should be "49th Ga. R."

Supreme Court of the United States in error to the Supreme Court of Georgia.

No. 577.

THE CENTRAL RAILROAD AND BANKING COMPANY

vs.

THE STATE OF GEORGIA.

No. 588.

The Southwestern Railroad Company

vs.

The State of Georgia.

FACTS FROM THE RECORD.

First—As to the Central Railroad and Banking Company.

In 1833 the General Assembly of Georgia incorporated "The Central Railroad and Canal Company," with an authorized capital of $3,000,000, "authorized and empowered to make, construct and maintain a canal or railroad * * * from the city of Savannah to the city of Macon." (Printed record, 3.) It was therein enacted that "the said canal or railway, and the appurtenances of the same, shall not be subjected to be taxed higher than a half per cent. upon its net income." (Ib., 4, §7.) The exclusive right to use, for such purposes, a strip of land forty miles wide along its line was granted by section ten. (Ib., 5.) This exclusive right was limited to thirty-six years from the completion thereof; but it was provided that said corporation shall, after the lapse of said thirty-six years, be and remain incorporated, and vested, as to their own works, with all the estate,

rights, powers and privileges by this act granted and secured except the exclusive right aforesaid. (Ib., 7, §22.)

In 1835, by amendment, its name was changed to the Central Railroad and Banking Company of Georgia for railroad and banking purposes; (Ib., 7, §1,) and it was declared that: "The said railroad, and the appurtenances of the same, shall not be subjected to be taxed higher than one-half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of the said company within the jurisdiction of said corporation, in the ratio of taxation of like property." (Ib., 13, §18.) By section 24 of said act, it was provided (Ib., 14,) that after twenty-five years this corporation "be and remain incorporate, and vested, as to *their own works* with all the estate, rights, powers and privileges by this act granted and secured, except the exclusive right aforesaid, and except the banking privileges hereby granted."

In 1850 it was authorized to extend its road *into* Macon, and unite with the Macon and Western Railroad Company in a common depot. Ib. 20.

In 1859 it was authorized "to consolidate and make one" the stocks of the Milledgeville and Gordon Railroad Company, and the Eatonton Branch Railroad, with the stock of the Central Railroad and Banking Company of Georgia, and to issue $1,000,000 additional stock therefor. And it was by this act declared: "That *the additional capital stock in the said Central Railroad and Banking Company of Georgia, authorized by this act to be issued and disposed of, shall be subject and liable to pay the same rate of tax to the State of Georgia that is, or shall be, required of the citizens of this State on their property;* and it shall be the duty of the President of the said The Central Railroad and Banking Company, when the annual return for tax of said company shall be made, to return on oath the amount of such additional capital stock issued, and to pay the tax thereon. (Ib. 22. 23.) In 1870 its banking privileges were renewed. (Ib. 25.) These, and other amendments in the record, one increasing its stock to $5,000,000, were each and all accepted. (Ib. 3.)

In 1847 the General Assembly of Georgia incorporated the Macon and Western Railroad, with power to build a railroad *from* Macon, Georgia, to Atlanta. Its charter did not contain any exemption from taxation, and no legislation on the subject of taxing it specifically was ever had, except an act approved the 9th of February, 1869, of which the following is a copy:

"An act to amend the charter of the Macon and Western Railroad Company, which was assented to on the 29th December, 1847; to allow an increase of the capital stock of said company; to fix the rate of tax to be paid by the same, and for other purposes.

"SECTION 1. *Be it enacted, etc.*, That the said Macon and Western Railroad Company is hereby authorized to increase its capital stock so as to make the same ($2,500,000) two million and five hundred thousand dollars. This increase may be made from time to time, as

it may be deemed expedient by a majority of the board of directors of said company for the time being, and by such sum or sums as said board of directors may order and determine; and said board of directors, for the time being, is hereby authorized by a majority to prescribe the terms and conditions of subscription for such additional stock as may from time to time be required: *Provided, nevertheless*, That such additional stock as may be issued, as well as the present stock of said company, shall hereafter pay the same annual tax to the State as the other railroad companies now do, viz: one-half of one per cent. on the amount of net ~~increase~~ income —

"SECTION 2. That all the chartered rights and privileges granted to said company by the said act of 29th December, 1847, and by this act, are hereby continued for and during the term of thirty years from the passage of this act.

"SECTION 3. Repeals conflicting laws."

Approved February 9th, 1869. (Ib. 28, 29.)

In 1872 the General Assembly of Georgia passed the following act:

"An act to authorize and provide for the union and consolidation of the Macon and Western Railroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company, and for other purposes therein named.

Approved August 24th, 1872.

SECTION 1. *Be it enacted by the General Assembly of the State of Georgia*, That the Macon and Western Railroad Company and the Central Railroad and Banking Company of Georgia be, and they are hereby, authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies under the name and charter of the said The Central Railroad and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated companies: Provided, That nothing therein contained shall relieve or discharge either of said companies from any contract heretofore entered into, but that all such contracts shall be assumed by, and be binding on, the Central Railroad and Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last mentioned company: And provided further, That, upon such union and consolidation, the capital stock of the Central Railroad aud Banking Company of Georgia shall not exceed the amount of the authorized capital thereof and the present authorized capital of the Macon and Western Railroad Company added thereto.

SEC. 2. *Be it further enacted*, That such union and consolidation as is herein provided for shall not take place until at least two-thirds of the stockholders of each of said railroad companies (estimated by

the number of shares held by each) shall have assented thereto, either in a stockholders' meeting, called for that purpose by said companies, respectively, or by written authority to the directors by the stockholders, representing at least two-thirds of the stock of each of said companies.

SEC. 3. *Be it further enacted*, That when it shall be ascertained, in the manner herein provided, that at least two-thirds of the stockholders of each of said companies have assented to such union and consolidation, it shall be the duty of the board of directors of each of said companies, respectively, to complete said union and consolidation, and to certify the same under the corporate seals of said companies, respectively, to his Excellency, the Governor of this State, to be filed in the office of the Secretary of the State.

"SEC. 4 *Be it further enacted*, That, upon the union and consolidation herein provided for, each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a shareholder in the Central Railroad and Banking Company of Georgia, for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the same rights, privileges and benefits as attach to the holder of stock now held by the shareholders in said companies, or either of them.

"SEC. 5. Repeals conflicting laws."—Ib. pp. 27–28.

Under it the Central Railroad and Banking Company of Georgia and the Macon and Western Railroad Company consolidated; the stock of the former then being $5,000,000, and of the latter $2,500,000, which is the relative value of the parts now.—Ib. 3.

On the 28th of February, 1874, the General Assembly of Georgia enacted as follows:

"An act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act.

"SECTION I. *The General Assembly do enact*, That, from and after the passage of this Act, the Presidents of all the railroad companies in this State shall be required to return, on oath, annually, to the Comptroller-General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller-General.

"SECTION II. *Be it further enacted*, That said Presidents shall pay to the Comptroller-General the taxes assessed upon the property of said

railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the tax so assessed, the Comptroller-General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

"SECTION III. *Be it further enacted*, That if any railroad company affected by the first and second sections of this Act desires to resist the collection of the tax herein provided for, said company, through its proper officer, may, after making the return required in the first section of this Act, and after paying the tax levied on such corporation by the tax act of 1873, and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller-General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton county, to be there determined as other illegalities, only the same shall have precedence of all cases in said court, as to time of hearing, and the same rights of motions for new trial and writs of error as in other cases of illegality, on the part of the Comptroller-General and of said corporation, in which cases the Comptroller-General shall be represented by the Attorney-General of the State, or such other attorney as the Governor may select, and if the grounds of such illegality be not sustained, the Comptroller-General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of this Act, and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller-General.

"SECTION IV. Repeals conflicting laws."

Approved February 28, 1874.

(Acts 1874, page 107.)

Afterwards the Central Railroad and Banking Company made its return, as required by the act of 1874, but declined to pay the tax thereby demanded.

On the 2d of October, 1874, the Comptroller-General issued his *fi. fa.* for the tax, ($46,034.87,) and the same was levied upon the depot grounds, etc., in Atlanta, Ga., which had belonged to the Macon and Western Railroad Company. The company paid the tax of one-half of one per cent. on net income, required by the law of 1873, and filed its oath of illegality as to the balance upon the following grounds:

"The same has been levied on property of defendant, and is proceeding illegally, because, it says:

"First, that by the charter of incorporation of this defendant,

granted the 14th day of December, 1835, by the 18th section thereof, it is provided that this defendant's railroad, and the appurtenances of the same, shall not be subject to be taxed higher than one-half of one per centum upon its annual net income; and under said charter the stock of said company was subscribed and paid up and expended in the construction and equipment of its said railroad and appurtenances, and in the purchase and erection of such depots, buildings, and other appurtenances as properly belong to the same, all constituting said railroad and appurtenances; that the said stockholders accepted said charter, and that the said provision in the charter has never been repealed or changed by or with the consent of this defendant.

Second, that all the property of this defendant on which said tax is assessed, and said *fi. fa.* issued, is property in which the capital stock of this company is invested, and constitutes as well its stock and its railroad and appurtenances, and the tax so assessed is a tax on said railroad and appurtenances, and the said tax so assessed is a tax which far exceeds a tax of one-half of one per cent. on its net annual income, which last mentioned tax for the last tax year has been paid by this defendant to the Comptroller-General of the State.

"Third, that there is no valid law of this State under which said tax is assessed and said *fi. fa.* issued; and the act of the General Assembly assented to February 28, 1874, entitled "an act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act," is void and of no effect, in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another and greater tax than one-half of one per cent. on the annual net income of this defendant, because said act is in conflict with the Constitution of the United States, as being an act impairing the obligation of a contract, and, therefore, a violation of the first paragraph of the tenth section of the first article of the Constitution of the United States."

The cause was tried before the Hon. Jno. L. Hopkins, Judge of the Superior Courts of the Atlanta circuit, who, by consent, was to pass upon "the law and facts, without a jury, subject to review, as in other cases." It was agreed that the charters of the Central Railroad and Banking Company, and of the Macon and Western Railroad Company, and the amendments, be used as evidence by either party. It was admitted that the amendments published in the public laws were accepted by said companies, unless shown to the contrary; and that the consolidation of the Macon and Western Railroad Company and the Central Railroad and Banking Company was made and completed in accordance with the act permitting the same, and the defendant now holds all the property of both railroad companies, from Savannah, Ga., to Atlanta, Ga., and that in the consolidation the Central Railroad and Banking Company's property was valued at $5,000,000, and the Macon and Western Railroad Company's prop-

erty at $2,500,000, and that may be taken as the relative value of the respective parts, for the purposes of this case.

Judge Hopkins overruled the oath of illegality, and ordered the *fi. fa.* to proceed for the tax.

Second—Facts as to the Southwestern Railroad Company.

In 1845 the General Assembly chartered the Southwestern Railroad Company to build a railroad from Macon towards the navigable waters flowing into the Gulf of Mexico, to any point intermediate between Albany and Fort Gaines, or to a point upon the Flint and Chattahoochee Rivers below Albany and Fort Gaines, (R. 3, 4,) with certain exclusive rights for fifty years, and after that to "remain incorporated and vested *as to their own work*, with all the estate, rights, powers and privileges by this act granted, except the exclusive right aforesaid" (§ 19, page 7.) Among the privileges was § 14, page 6: "That the said railway, and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half per cent. upon its net income."

On the same day, in 1845, the Muscogee Railroad Company was incorporated with power to build a railroad from Columbus to West Point (R. page 9.) That charter declared: "That the capital stock of said railroad company shall not be taxed by the State higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on stock of said company." (Ib. § 5, page 10.

In 1850 this Muscogee Railroad Company was "empowered to connect their railroad with the Southwestern Railroad at Fort Valley, or at any other point between Fort Valley and Macon." (Ib. 14.)

In 1856, the General Assembly of Georgia passed the following act:

"An act to authorize and provide for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company.

"SECTION 1. *Be it enacted, etc.*, That upon a vote of a majority of two-thirds of the stockholders, in amount, in the aforesaid companies respectively, in favor of the union and consolidation of the Muscogee Railroad Company, its franchises and property, with the said Southwestern Railroad Company, under the charter of the last mentioned company, on such terms as the said companies may respectively agree, it shall be lawful so to unite and consolidate the said two companies into one, under the charter of the Muscogee Railroad Company.

"SEC. 2. *And be it further enacted*, That upon such union and consolidation the capital stock of the Southwestern Railroad Company shall not exceed the amount of the present authorized capital thereof, and the present authorized capital of the Muscogee Railroad Company.

"SEC. 3. *And be it further enacted*, That upon such union and consolidation as hereinbefore provided for, the holders of stocks in the Muscogee Railroad Company shall surrender their certificates of stock to the Southwestern Railroad Company, and receive in lieu thereof

certificates of stock in the Southwestern Railroad Company, to such an extent and amount as the said two companies may agree on; and thenceforward all the rights, privileges and property of the said Muscogee Railroad Company shall be part and parcel of the said Southwestern Railroad Company, and all the chartered rights and privileges of the Southwestern Railroad Company be extended over the track and line of the Muscogee Railroad Company, and everything appertaining thereto; the name and style of the consolidated company shall be and continue 'The Southwestern Railroad Company.'

"SEC. 4. *And be it further enacted*, That upon the union and consolidation of said companies, all the debts and liabilities of the Muscogee Railroad Company shall be assumed and paid by the Southwestern Railroad Company.

SEC. 5. *And be it further enacted*, That this Act shall go into operation when, and not until, there shall be a vote of a majority of two thirds of the stockholders, in amount of stock of each of said companies, in favor of this union and consolidation, and of the provisions of this Act, certified under the corporate seals of said companies respectively, to his Excellency, the Governor of this State.

"SEC. 6. *And be it further enacted*, That if, from any cause, the union and consolidation of the said companies hereinbefore provided for shall not take effect, then it is hereby declared that nothing herein contained shall affect, alter or change in any way the present existing rights of the said companies respectively.

"Approved March 4th, 1856." (Ib., 14 and 15.)

The consolidation was completed in November of 1868.

This consolidated company made its return for taxation, declined to pay the tax required by the act of 1874 (*ante*,) *fi. fa.* was issued against it for $28,203.29, and levied upon its property. It paid the tax of one-half per cent. on its net income, and filed its oath of illegality to the *fi. fa.*, as follows:

Said *fi. fa.* is proceeding illegally, because—

"First—That by the charter of incorporation of the defendant, granted 27th day of December, 1845, by the 14th section thereof, it is provided that said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per centum upon its annual net income, and under said charter the stock of said company was subscribed and paid up, and expended in the construction and equipment of its said road and appurtenances, and in the purchase and erection of such depots, buildings, and other appurtenances as properly belonging to the same, all constituting said railroad and appurtenances; that the said stockholders accepted said charter; and that the said provision in the charter have never been repealed or changed by or with the consent of this defendant.

"Second—That all the property of this defendant, on which said tax is assessed and said *fi. fa.* issued, is the property in which the capital stock of this company is vested, and constitutes as well its stock and its railroad and appurtenances, and the tax so assessed is a

tax on its said railroad and appurtenances, and the said tax so assessed is a tax which far exceeds a tax of one-half of one per cent. on its annual net income, which last mentioned tax, for the last tax year, has been paid by this defendant to the Comptroller General of the State.

"Third—That there is no valid law of this State under which said tax is assessed and said *fi. fa.* issued, and that the act of the General Assembly, assented to February 28th, 1874, entitled "an act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act," is void and of no effect, and in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another and greater tax than one-half of one per cent. on the annual net income of this defendant; because said act is in conflict with the Constitution of the United States, as being an act impairing the obligation of a contract, and, therefore, violative of the first paragraph of the tenth section of the first article of the Constitution of the United States."—(Ib. 16–17.)

This was submitted to Judge Hopkins, under a like consent; and with the further consent and admission, as follows:

"We consent that the charters of the Southwestern Railroad Company and the Muscogee Railroad Company, and the act of 1865, allowing their consolidation, may be considered as in evidence. It is admitted that each was a completed railroad before 1863, that negotiations for their consolidation were being had prior to 1863, but the same was not completed, and the consolidation did not take place till the — of November, 1868. It is admitted that the Southwestern Railroad Company has paid the tax of one-half of one per cent. on net income for tax last year, as required by tax act of 1874, as condition of illegality."—(Ib. 3.)

Judge Hopkins overruled this oath of illegality also, and ordered this *fi. fa.* also to proceed.

These cases, and another, were carried to the Supreme Court of Georgia for review, and there argued together.

The opinion and judgment of that Court were as follows:

"Opinion of Warner, C. J.

"On the 28th of February, 1874, the General Assembly of the State of Georgia passed an act to amend the tax laws of the State so far as the same related to the railroad companies, and to define the liability of such campanies to taxation, and to repeal so much of the charters of such companies, respectively, as might conflict with the provisions of that act. The act requires the presidents of all the railroad companies in the State to return, on oath, annually, to the Comptroller-General, the value of the property of their respective companies, without deducting their indebtedness, to be taxed as other property of the people of the State, and provides for the collection of the same.

"The 4th section of the act repeals all conflicting laws.

"In accordance with the provisions of the above recited act, the Comptroller-General of the State issued executions against the Central Railroad and Banking Company of Georgia, the Southwestern Railroad Company, and the Augusta and Savannah Railroad Company, for the collection of the tax claimed to be due to the State by each company respectively. The companies filed affidavits of illegality to the executions as provided by the act of 1874, and, on the hearing thereof in the court below, the court overruled the grounds taken in the affidavits of illegality by the Central Railroad and Banking Company, and the Southwestern Railroad Company; whereupon the defendants excepted, and alleged the same as error. The court sustained the affidavit of illegality made by the Augusta and Savannah Railroad Company, whereupon the State excepted, and assigned the same as error.

"The three cases were argued together here.

"It is insisted by the plaintiff in error, in the two first-named cases, that the act of 1874 is unconstitutional and void, because it impairs the obligation of the contract made by the respective companies with the State, under the respective charters thereof, within the true intent and meaning of the 10th section of the 1st article of the Constitution of the United States.

"By the original charter of the Central Railroad and Banking Company, granted to it in 1835, it is provided 'that said railroad, and the appurtenances of the same, shall not be subject to be taxed higher than one-half of one per centum upon its annual net income.' By the original charter of the Southwestern Railroad Company, granted to it in 1845, it is provided 'that the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income.'

"If the defendants were now before the court, under the original charters as granted by the State, and as then accepted by each company, that would have been an executed contract between the State and the respective companies, and the State, as the law then stood, could not have impaired the obligation thereof by the passage of the act of 1874. But do the defendants now stand before the court as they would have stood under the law as it existed at the time of the granting and acceptance of the original charters? Have the two companies accepted new charters under a new and different law than that which existed in the State at the time the original charters were granted and accepted? If the two companies have obtained new charters and new grants from the State since the enactment of such new law, and accepted the same, then that new law of the State entered into and formed an essential element of the contract between the State and the new companies.

"By the general law of this State, as declared on the 1st of January, 1863, (that being the time the Code took effect as the law of the State,) corporations are either public or private. A public corporation is one having for its object the administration of a portion of the

powers of government delegated to it for that purpose. Such are municipal corporations. All others are private, whether the object of incorporation be for public convenience or individual profit, and whether the purpose be, in its nature, civil, religious, or educational. In all cases of private charters, hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter. Private corporations, heretofore created, without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State. (New Code, secs. 1671, 1672–3, 1642, 1643.) Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant. (Code, 1639.) In the case of the West End and Atlanta Street Railroad Company vs. The Atlanta Street Railroad Company, 49th Ga. Rep., 151, this court, in giving an interpretation to the 1642d section of the Code, held that the power reserved by the State to withdraw the entire franchise necessarily included the power to modify or restrict the exercise of it. This court also held, in that case, that this section of the Code introduced a new element into the law of private corporations in this State, and that all charters granted by the State to private corporations since its adoption are subject to its provisions, and that the acceptance by the company of the grant made by the General Assembly must be understood as having done so with a full knowledge of this general law, as much so as if it had been inserted in the act of incorporation; for it is a well established rule that the laws which exist at the time and place of the making of a contract, applicable thereto, enter into and form a part of it.

"In August, 1872, the General Assembly of the State passed an act to authorize and provide for the union and consolidation of the Macon and Western Railroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company. By this act the two companies were authorized and empowered to unite and consolidate the stocks of said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said Central Railroad and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated company. The act further provides that neither company should be discharged from any contract previously entered into, but all such contracts shall be assumed by and be binding on the Central Railroad and Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last mentioned company, and that the capital stock of the Central Railroad and Banking Company of Georgia shall not exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon and Western Railroad Company added thereto. The 2d sec-

tion of the act provides for the assent of the stockholders of each company to the consolidation. The 3d section provides for notification to the Governor of the consolidation of the two companies under the act. The 4th section provides that each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a stockholder in the Central Railroad and Banking Company of Georgia, for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the rights, privileges and benefits which attach to the holder of stock now held by the shareholders in said companies or either of them. The 5th section repeals all conflicting laws.

"Was this an act of incorporation as defined by the common law and by our Code? A corporation, as defined by the ancient common law, is a franchise created by the King, and is a body constituted by policy, with a capacity to take or to do. (4th Comyn's Digest, top page 465, title, Corporation.) There need not be any precise words to make a corporation. Anciently, if the King had granted to a vill, *gildaui mercatoriam*, it was, by such grant, incorporated. (4th Comyn's Digest, top page 470; see, also, 2d Kent's Com., 307; Denton vs. Jackson, 2d Johns. Chancery Reports, 324.) One corporation may be made out of another corporation. (6th Viner's Ab., 260.) A corporation, as defined by our Code, is an artificial person, created by law for specific purposes, the limit of whose existence, powers and liabilities is fixed by the act of incorporation usually called its charter. (New Code, 1670.)

"The specific purposes for which this charter was granted by the State is manifested by the terms of the charter. The State created by law this corporation, and granted to it the right and privilege to unite and consolidate the stocks of the two companies, and all the rights, privileges, immunities, property and franchises belonging or attaching to said companies, under the name and charter of the said Central Railroad and Banking Company of Georgia, in such manner as is specified therein. In other words, the State granted to this corporation all the rights, privileges, etc., which belonged to either company, under the name and charter of ihe Central Railroad and Banking Company, and the new consolidated company was to have the same rights, privileges and immunities as the Central Railroad and Banking Company had under its charter. Instead of specifying in the new act of consolidation what the rights, privileges and immunities of the Central Railroad and Banking Company were, reference must now be had to its original charter to ascertain them. The fact that the consolidation act of incorporation confers upon the new company the same rights, privileges and immunities as were conferred upon the Central Railroad and Banking Company, has no more legal significance than if the words of its original charter had been incorporated into the new consolidation act. Under the new consolidation act of incorporation the company has conferred upon it, by the grant from the State, all the rights, privileges and immunities which were conferted by the original

charter of the Central Railroad and Banking Company, and in order to ascertain what those rights, privileges and immunities are, we must look to that original charter, inasmuch as the same are not specified in the new consolidation act of incorporation; but that does not prove that the act of August, 1872, was not a legal act of incorporation by the General Assembly of the State. There are many acts of incorporation in this State which refer to the charters of other incorporated companies, as to the powers, priivleges, immunities and franchises granted by the General Assembly, but it has never been doubted that such acts were valid acts of incorporation.

"The contract between the State and the Central Railroad and Banking Company, under the act of August, 1872, is not the same contract as that made with it by the State in 1835. That company acquired new rights and other privileges, under the act of 1872, in addition to those granted to it in 1835. It is true that, in addition to the rights and privi'eges granted by the act of 1872, the General Assembly also granted to the new company, by that act, all the rights, privileges, immunities, property and franchises belonging or attaching to the Central Railroad and Banking Company as specified in its charter of 1835, but the acceptance of the grants contained in the act of 1872 by the company was a new contract with the State. There was a new consideration obtained by the company under the charter of 1872 which did not exist under the charter of 1835, and there was a a new party introduced by the charter of 1872 and consolidated with the company, to-wit: the Macon and Western Railroad Company, and the acceptance of the charter of 1872 by the company, upon a new consideration and with a new party consolidated into the company, was such a novation of the original contract, under the old charter, as put an end to it, and created a new company under the charter of 1872, which, under the general laws of the State, will not expire until thirty years from the date of the charter. (See new Code, 2724, as to novation of contract.) If, however, the General Assembly of the State, by the act of 1872, had done nothing more than simply renew the charter of the company granted to it in 1835, with all its rights, privileges, immunities and franchises as therein specified, and the company had accepted the same, would it not have been accepted in view of the general law of the State as declared by the Code of 1863? But the act of 1872 does much more than that, as will readily be perceived by referring to its provisions.

"The main point in the case is, whether the grant of exemption from taxation, as specified in the charter of 1835, and referred to in the act of 1872, as one of the privileges and immunities granted to the company, is such an executed contract, between the State and the company, the obligation of which the State cannot impair by withdrawing the franchise granted. By the general law of the State at the time the charter of August, 1872, was granted by the General Assembly consolidating the companies, and at the time of its acceptance, the State had reserved the right, by her public law, to withdraw

the franchise granted, unless such right to withdraw had been expressly negatived in the charter.

"The 4th section of the new Code declares that, in the construction of all statutory enactments of this State, the ordinary signification shall be applied to all words except words of art, etc. The ordinary signification of the word 'franchise,' as defined by Webster, is 'a particular privilege or right granted by a prince or a sovereign to an individual, or to a number of persons; an exemption from a burden or duty to which others are subject.' In a legal sense, franchise and liberty are used as synonymous terms, and the kinds of them are various and almost infinite. (2d Blk. Com., 37.) To 'withdraw' is to take away what has been enjoyed, to take from. It may be conceded that the company, under its charter of 1872, had, as one of its franchises granted to it by the State, the right to be exempted from the payment of a higher tax than one-half of one per cent. upon its annual net income; still, the State reserved the right (whether wisely or unwisely is not a question for the courts to decide) to withdraw that franchise whenever in their judgment the public interest required it, without impairing the obligation of her contract with the company, as prohibited by the Constitution, for the reason that the company accepted the grant upon that condition; that it was a part of the contract between the State and the company when it accepted the grant. (West End and Atlantic Street Railroad Company vs. The Atlanta Street Railroad Company, 49 Ga. Rep., 151.)

"The Supreme Court of the United States fully recognized these general principles in Tomlinson vs. Jessup, 15th Wallace Rep., 454; Miller vs. The State, Ibid., 478; Holyoke Company vs. Lyman, Ibid., 500. In the case of Tomlinson vs. Branch, Ibid., 460, which was cited by the plaintiff in error, it was held by the court that the act of the South Carolina Legislature of 1843, authorizing the consolidation of two railroad companies, withdrew the charter from the operation of the 41st section of the act of 1841 of that State, providing for the repeal or modification of charters granted by the State, and, therefore, that case does not contravene the rulings of that court in the other cases cited.

"This charter of the company would have continued for thirty years from the date of its grant, and the right of the State to withdraw any of the franchises granted by it to the company is not expressly negatived by it. The reasons why the State did not negative her right to withdraw any of the franchises granted do not appear. The General Assembly may have thought that, inasmuch as the Central Railroad and Banking Company had enjoyed the exemption from taxation at a higher rate than one-half of one per cent. upon its net annual income, for many years, and being then abundantly able to take care of itself, and, by the consolidation of another company with it, thereby increasing its power and strength in the State for thirty years, that her interest required that she should reserve to herself the right to withdraw at least one of the franchises granted, whenever in her judgment the public interest should demand it. Whatever may

have been the reasons which operated on the mind of the Legislature for reserving this right of the State in making the grant is not now a question for the courts to determine. Although the State did reserve the right in making the grant to withdraw the franchise, it is not to be presumed that she would exercise that right captiously or unjustly, and it is not apparent that she has done so. The State has only exercised her sovereign power of taxation by taxing the property of the company as the property of the whole people of the State is taxed, and not otherwise, and cannot tax it otherwise under the provisions of the State Constitution, if she was disposed so to do.

"It was insisted on the argument by the plaintiffs in error that, inasmuch as this court had decided in the case of the Mechanics' Bank vs. Heard, 37th Georgia Reports, 461, that a corporation could not voluntarily surrender its franchises to the State without the assent of the Legislature, that it might be compelled to continue after its most valuable franchises had been withdrawn. The charter in that case was granted prior to the adoption of the Code of 1863. This court never has decided, and perhaps never will decide, that, when the State withdraws any of the franchises granted to a corporation since the adoption of the Code, such corporation cannot voluntarily surrender its franchises to the State, as provided by the 1686th section thereof.

"The Southwestern Railroad Company occupies a different position in one respect from that of the Central Railroad and Banking Company. It appears from the evidence in the record that the act providing for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company, was passed in 1856, the 5th section of which declared that the act should not go into operation until there should be a vote of a majority of two-thirds of the stockholders of each company in favor of the union and consolidation, and of the provisions of the act, which was not done until 1868, and the consolidation of the two roads did not take place until November, 1868. The act authorizing the consolidation of the two roads was not accepted by the stockholders thereof until 1868, and did not become a contract between the State and the Southwestern Railroad Company until that time, which was subsequent to the adoption of the Code in 1863. The contract was, therefore, consummated in view of the public law of the State as it existed at that time, and the exercise of the taxing power of the State, as provided by the act of February, 1874, did not impair the obligation of that contract, as provided by the Constitution of the United States.

"What has been said in relation to the act consolidating the Macon and Western Railroad Company with the Central Railroad and Banking Company is also applicable to the act consolidating the Muscogee Railroad Company with the Southwestern Railroad Company.

"The Augusta and Savannah Railroad Company was chartered by the General Assembly of the State in 1838, before the adoption of the code in 1863. By the 18th section of its charter it is provided 'that

said railroad and the property of said company shall not be subject to be taxed higher than one-half of one per cent. on its annual income.' The defendant alleged in its affidavit of illegality to the execution issued against it by the State, reciting the exemption in its charter, that the act of 1874, under the provisions of which the execution against its property was issued, was unconstitutional and void, because it impaired the obligation of its contract made with the State on the statement of facts made in the record. The counsel for the State demurred generally to the defendant's affidavit of illegality, which demurrer was overruled by the court, and the affidavit of illegality was sustained.

"When the State made the grant to the defendant contained in its charter, and the same was accepted, it became an executed contract between the State and the defendant, and the State, under the law as it then existed, could not impair its obligation by withdrawing the franchise granted, as she attempted to do by the passage of the act of 1874; and, so far as said act was applicable to the defendant's franchise, as specified in the grant, exempting its railroad and property from a higher rate of taxation than one-half of one per cent., it did impair the obligation of the contract, and, as to that contract, was unconstitutional and void, the State not having reserved the right to withdraw the franchise granted at the time the grant was accepted by the company.

"After a careful examination of the questions made in the record, the conclusion is: 1. That the act of the 24th of August, 1872, consolidating the two railroad companies under the name and charter of the Central Railroad and Banking Company of Georgia, created a new corporation for the specific purposes as therein declared, and as no time was specified in the act for its continuance, it would not expire under the general law of the State until the end of thirty years from the date of the act. 2. The fact that all the rights, privileges, immunities, and franchises of the Central Railroad and Banking Company, as specified in its old charter, were conferred by the act of 1872 upon the new company, those rights, privileges, immunities, and franchises were granted by the act to the new company in the same manner and have the same legal effect as if the same had been specically ennumerated in the body of the new act, and when accepted by the new company were accepted in view of the provision of the 1682nd section of the code, and, therefore, the State reserved the right to withdraw the franchise as to the exemption from taxation, as she has done; and such withdrawal did not impair the obligation of her contract with the company, as prohibited by the Constitution of the United States. And the same principles are applicable to the Southwestern Railroad Company.

"Third. The Augusta and Savannah Railroad Company standing upon its original charter, as it was granted and accepted prior to the adoption of the code of 1863, the State could not, by the act of 1874, withdraw any of the franchise granted to that company without impairing the obligation of her contract with it, she not having reserved

the right to do so when the contract was made. The 1682nd section of the code of 1863, not being a part of the public law at that time, did not enter into and constitute any part of the contract between the State and that company.

"Let the judgment of the court below, in the three cases mentioned in this opinion, be affirmed.

"Concurring opinion of McCay, J.:

"1. Under section 1682 of the code of 1863, which is in these words: 'In all cases of private characters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter;' and under section 1640, which is in these words: 'A corporation may be dissolved by a voluntary surrender of its franchises to the State,' it is competent for the legislature to alter any charter granted since the 1st of January, 1863, unless that right be expressly negatived by the charter, or it may withdraw any portion of the franchise, leaving it to the corporation to continue or to surrender at its pleasure.

"2. Under the original charters of the Central Railroad Company and the Southwestern Railroad Company, the latter passed in 1845, and the former in 1835, they were both exempted from taxation by the State, except to the extent of one-half of one per cent. upon the annual net income, and under said charter such exemption was irrepealable by the legislature.

"3. The legislature on August 4th, 1872, passed an act 'to authorize and provide for the union and consolidation of the Macon and Western Railroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company, and for other purposes therein named.' It was provided by said act,

"'That the Macon and Western Railroad Company and the Central Railroad and Banking Company of Georgia be, and they are hereby, authorized and empowered to unite and consolidate the stocks of said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said Central Railroad and Banking Company of Georgia, in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of the shares of the capital stock of the consolidated company.'

"SEC. 2, provided that the act should not take effect until two-thirds of the stockholders of each company should consent.

"SEC. 3, provided that on such assent the respective directors of said roads should complete the union and consolidation, and should certify the same, under the corporate seals of the companies, to his Excellency, the Governor, to be filed in the office of the Secretary of State.

"The consent of the stockholders was given, and the consolidation completed, and the certificate filed as provided.

"Held that the act of August, 1872, was, in all essential ingredients, the creation of a new corporation, with the rights, privileges, and immunities of each of the old ones, but said rights, privileges, and immunities were and are held and enjoyed under the act of August 24th, 1872, and not under the original charters of the several companies.

"4. That the necessary and legal effect of the filing of the certificates of consent and consolidation, in the office of the Secretary of State, was the surrender of the several charters of the two roads to the State, and the acceptance of the new charter of the consolidated company as the tenure and measure of the rights and privileges of the consolidated company.

"5. The charter of the Central Railroad and Banking Company, to wit: The original Central Railroad and Banking Company and the Macon and Western Railroad Company, consolidated by the act of August 24, 1872, under the name of the Central Railroad and Banking Company, is a private charter, granted since the 1st of January, 1863, and the company holds its franchises under section 1682 of the Code of 1863, there being nothing in the charter expressly negativing the right of the State to withdraw the franchises therein granted.

"6. By the act of 1850, entitled 'an act to authorize or provide for the union and consolidation of the Muscogee Railroad Company with the Southwestern Railroad Company, under the charter of the latter company, it is provided, 1st. That upon a vote of a majority of two-thirds of the two companies, it should be lawful to unite and consolidate the two companies into one, under the charter of the Southwestern Railroad Company; that the name and style of the new company should be and continue 'The Southwestern Railroad Company;' that the act should go into operation when, and not until, there shall be a vote of a majority of two-thirds of the stockholders, in amount, of each company, in favor of this union or consolidation, certified under the corporate seals of said companies, respectively, to his Excellency, the Governor of this State. The vote was had and the consolidation effected and certified in November, 1868.

"Held, that whilst the Southwestern Railroad Company, as constited under the act of 1856, which did not, by its terms, go into effect until the certificate of a consent of two-thirds of the stockholders was filed in November, 1868, has, under the charter consolidating the Southwestern and Muscogee Railroad Companies, all the rights of either of said two companies, yet it holds them under the law as it stood at the time its charter of consolidation took effect, to-wit: in the year 1868, and this is a private charter, granted since January, 1863, and is subject to the provisions of section 1682 of the Code of 1863.

"7. The tax of 1874, taxing the property of the several railroads of this State, as the property of other citizens of this State is taxed, is a withdrawal of any franchises of exemption from taxation to any railroad company chartered, or holding its franchises under any law, passed since the 1st of January, 1863."

McCAY, concurring.

Assuming, that under the original charter of these companies—the Central Railroad and the Southwestern Railroad—they were exempt from taxation at a higher rate than one half of one per cent. on the net income of each, and that it was not competent for the Legislature to take away that privilege, it is my judgment that under the several acts, providing for the consolidation of the Central Railroad Company and the Macon and Western Railroad Company and the Southwestern and Muscogee Railroads, two new corporations were created, and these new companies, whilst they had the same exemption, yet they each hold it subject to be withdrawn, as declared in section 1682 of the Code. That section is in these words: 'In all cases of private charters hereafter granted the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.' It is not denied that these companies had, after the consolidation, every right granted in their original charters. The point made against them, and upon which the State of Georgia rests her right, is, that after the consolidation, they held these rights, not by virtue of the old charters but by virtue of and under the consolidating acts, and so holding them, that they only hold them at the will of the State; that holding them under a grant of a date subsequent to first of January, 1863, (when the Code went into effect), the Legislature may repeal that law, take away that grant.

"It is claimed, on the part of the State, that the necessary legal, inevitable effect of the consolidating act, and the acceptance of it by the corporations, was in each case a surrender by the companies to the State of their old charters, and the acceptance of a new charter, and that this new charter, though it regranted all the rights, privileges and immunities of each of the old charters to the consolidated company, is, as it is of a date subsequent to the Code, subject to the provisions of section 1682 of that Code. Whether this be so is the great question we have to determine.

Do these companies hold their franchises under their original charters, or do they hold them under the consolidating acts?

If their tenure be under the consolidating acts, the State has a right of repeal; if under their charters, the State has not.

It occurs to me that the decision of this question turns very materially on the meaning of the word consolidation as applied to two or more corporations. Such an application of the word is not only new, but seems to be confined to the United States. In England they use the word amalgamation to express something of the same idea. Though even that word, as used in England, does not seem to have any certain and defined meaning. It may mean a mere sale of the assets and business of one company to another, or it may mean the abandonment by two companies of their respective articles, and the formation of the new one composed of the members of the two old ones. Dr. Brice, in his book on *Ultra Vires*, commences his chapter on amalgamation of railroads by a discussion of the civil law doctrine of novation, as when A owes B, and B owes C, and there is a nova-

tion of the contract, so as that A becomes the debtor of C, and the debt from A to B, as well as the debt from B to C, becomes extinct. See Green's Brice's *Ultra Vires*, 509, and note. The act of 33 and 34 Vic., C. 61 seems to treat "amalgamation" and "transfer of business" as distinct. The latter case is treated as a purchase, the former as a combination.

In this country I have not been able to find a case where the word amalgamation is used. Here the word consolidation is common, but so far as I have been able to find, it is only used in cases where there is a complete merger of two companies.

In McMahan vs Morrison, 16 Indiana, 172, Lauman vs. Lebanon Railroad Company, 30 Penn. St., 42, and in Paurel vs. Northern Mississippi Railroad Company, 42, Mississippi, 63, this term consolidation is defined "a dissolution of the old corporations, and at the same instant the creation of a new with property, liabilities and stockholders derived from those passing out of existence."

"The language of the act of August 25th, 1872, is that the companies shall be 'consolidated,' united; 'that the Macon and Western Railroad Company and the Central Railroad and Banking Company of Georgia be, and they are hereby, authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property and franchises, belonging or attaching to said companies, under the name and charter of the Central Railroad and Banking Company of Georgia, in such a manner, as that each and every owner and holder of shares of capital stock of the Macon and Western Railroad Company shall be entitled to, and receive, an equal number of shares of the consolidated company.'

"*Both Companies* are empowered 'to consolidate' and form a Union. Care is taken that the debts of *both* the organizations shall become the debts of the new. The stock to be issued to the Macon and Western stockholders is to be stock in the consolidated company.

"This language is entirely inconsistent with the idea insisted upon by the plaintiffs in error—to wit: That the act merely intended to allow a purchase by the Central Railroad Company of the Macon and Western. Why call the company the consolidated company? Why provide, as is done in this section two, for official action by both companies, either in a stockholders' meeting, or by written authority to the directors? Why take pains to carry over to the new company the debts of both of the old ones? It is impossible to conceive of *consolidation* if this be not one. The acts itself calls it so. The two companies do, in fact, become one. There is, it is true, no express provision that the old companies cease to exist, but that is the necessary effect of the arrangement. Nobody pretends that the Macon and Western Company is in existence; but there is no express language of the act so declaring. It has ceased to exist simply because all its stocks, franchises, debts and rights are absorbed in the *consolidated company*. Why is not this just as true of the old Central Railroad Company? Had a new name been taken nobody would for

a moment have supposed that the old Central Railroad Company did not go out of existence, precisely as did the Macon and Western. The stockholders of both are equal stockholders in the new company—the consolidated company—all the debts, of *both* are to be assumed by and be binding on the consolidated company, and all benefits and rights of both are to accrue to and vest in the same.

Why this singular language? Why should care be taken to carry over to the consolidated company debts and liabilities of both the Central and Southwestern Companies as well as the benefits?

There is, too, something in section 3 which, to my mind, adds force to these ideas. That section provides, that when the assent of the stockholders shall be had, the directors of both corporations shall "complete said union and consolidation, and certify the same to his Excellency, the Governor of this State, to be filed in the office of the Secretary of State." Why this formal provision for having this "union and consolidation" part of the public records? Such a proceeding fits aptly with the idea of a surrender of the old charters and the acceptance of the new.

Just such a thing would have been provided had such surrender and acceptance been the intent of the Legislature. I doubt if in all the "amendments," however important, that have been passed to the charters of corporations in this State, the acceptance of the amendment has been required to be so formally made.

Indeed, to take this act altogether, it would be very difficult to use language more apt to merge, amalgamate, consolidate both of these original corporations into a *new one*, and entirely to abandon the old companies Take the words of the 4th section—especially the last clause—defining the rights of the Macon and Western shareholders. It says: "Which new certificate shall entitle the holder thereof to the same rights, privileges and benefits as attach to holders of stock now (at the date of the act, and before the union,) held by the shareholders in said *companies*, or *either of them*."

By the very terms, over and over again repeated, the stockholders of both of these companies become stockholders in a road from Savannah to Atlanta. Each stockholder of each company keeps all his old rights, powers and privileges as to the road of his old company, and gets new rights in the consolidated company.

As to the debts of both the old companies, there is a clear novation. By the express terms of the act, the consolidated company undertakes to pay all the debts and liabilities of *both* of the old companies, and upon all *contracts* where rights accrue to either of the old companies, the consolidated company is to have the benefit of them.

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The Macon and Western Railroad Company has ceased to exist, simply because its property and franchises, its debts and liabilities are transferred to the *consolidated company*; and precisely the same thing is true of the old Central Railroad and Banking Company; for by the express terms of the act, its rights, privileges, immunities, property

and franchises, its debts and liabilities, and all benefits and rights arising under any of its contracts are transferred to the *consolidated company.*

As I have said, it is significant that the act itself, not only transfers the debts, liabilities, rights and benefits, etc., of *both companies* over. but does it to the consolidated company. So that this act not only authorizes the consolidation of the two companies, which *ipso facto*, according to the authorities and to the actual meaning of the word, involves the surrender of both the old charters, and the acceptance of the new one; but the details of the act—the words used—show that this was the clear comtemplation of the Legislature in passing the bill and granting the authority.

The 15 section of the act of Parliament of 1870, in reference to life insurance companies, has an expression in it that exactly conveys the idea I intend to express. The expression is this:

"When an amalgamation takes place between two companies, or when the business of one company is transferred to another, *the combined company or the purchasing company* shall," etc.

Was the union of the two companies—the Central and Macon and Western—a combination or a purchase? Were they *contractors* by which one became bound to the other; or by which the Central Railroad Company undertook a duty to the stockholders of the Macon and Western? Clearly this latter was not the case.

The assent of the Legislature having been given, and the assent of the stockholder obtained, the directors of each company officially "consolidated," and under the corporate seals of each company, certified that consolidation to the Governor. It is not a sale, not a transfnr of the Macon and Western to the Central, it is the mutual meeting, blending, union, consolidation of both in a new consolidated company. The Central loses its identity just as completely as the Macon and Western. The act of both is the same.

On the filing of the certificate, the stockholders of both the old companies, no longer stockholders in a road from Macon to Savannah, or from Macon to Atlanta, are stockholders in a road from Savannah to Atlanta stockholders in the consolidated company.

There is not a word in the act authorizing the then Central Railroad and Banking Company to work a railroad from Macon to Atlanta. Its old charter is not amended, and that old company, if it still exists, is to-day exercising a franchise not granted to it by law.

The consolidated company has the right to work a road from Savannah to Atlanta, but it is not the Central Railroad and Banking Company, chartered in 1835, nor is it the Macon and Western Railroad Company, but it is a consolidated company, formed under the act of August 24, 1872, and clothed with the full franchise, on the filing of the certificate of its formation or consolidation, with the Governor, as prescribed by the act.

A mere looker on, who sees the Central Railroad and Banking Company working the road from Macon to Atlanta, might suppose the charter had been amended, and the franchise extended. But we

find no such extension in the act of August 24, 1872. The Macon and Western Railroad is to-day working a road from Atlanta to Savannah just as much as the old Central Railroad Company is. The truth is, neither is doing it. A new company, formed under the consolidating act, and springing into existence on the transmission of the certificate of consolidation to his Excellency, the Governor, to be filed, as other acts of incorporation are, with the Secretary of State—a consolidated company, taking for its name the Central Railroad and Banking Company, is the entity that is operating the two roads now consolidated into one.

2. The doctrine is now well established by numerous decisions that if the State, in granting a charter, reserve the right to repeal, the right exists without qualification. That is the bargain, and though there are decisions that this right has limitations, yet the current of authority is the other way. Perhaps, too, all the cases are reconcilable, by admitting that the repeal cannot affect rights, between the corporations and third persons, arising under the charter. And this, it seems to me, is the logic and common sense of the matter. A bargain is a bargain. Those who enter upon the enterprise do so with their eyes open. I do not see how any limitation can exist. Even if by the law of the State, as was the common law, the real estate goes to the State on the dissolution, I see no reason why the State has not a right to exercise the privilege reserved in the charter. As I have said, those who make the venture, accept and act upon the charter, do so upon their own hazard. They take the risk like other people who undertake enterprizes, the success of which turns upon the permanence of particular laws.

So, too, it is well settled that when there is a general *law* declaring all charters granted after its passage repealable, it is not a violation of the obligation of the contract between the State and a coporation to repeal a charter so granted. The contract is entered into under the general law reserving the right of repeal, and the adventurers take the charter with such a construction upon the grant. A charter so granted stands on the same footing as though the right to repeal was reserved in the charter. The law declaring the right of repeal is a rule of construction.

An analogous case may be found in section 1688 of the Code, which declares that all charters expire at the end of thirty years, unless otherwise specially provided. At common law, charters were perpetual. Under the decision of the Supreme Court of the United States in the Dartmouth Col. case, charters were held, here, on this principle, to be perpetual and irrepealable. But our Legislature has repealed this common law rule, and declares charters not perpetual. It first limits them to thirty years, when they expire without more. 2d. It declares as a rule of law that the Legislature may repeal them, and the contract, like all other contracts, is entered into under the general law. As a matter of course, this being only a law, the Legislature may alter it, and so the Code provides that all charters are repealable unless it be expressly provided in any charter to the contrary—unless,

in other words, the law is repealed so far as that charter is concerned.

It results, therefore, that in any State where this general law exists, any charter in which it is not expressly declared that it is irrepealable, is subject to the legislative will, just as though it were specifically provided in the charter—47th Maine, 34; 32 N. J. L., 134; 21 N. Y. 9, 55. Penn St., 452; 3 Bush, Ky., 592. See also Tomlinson vs. Jessup, 13th Wallace, 457, where the law is so distinctly held.

But it is said that whilst it may well be, that the charter is repealable, it does not at all follow that it is competent to take away a part of it. The right to destroy may exist, and yet the Legislature has not a right to maim. But does not the right to repeal include the right to modify? Does not the greater include the less? Perhaps there might be strength in this position, if charters in this State stood as they do at common law. If it were competent for the State to compel a corporation to exercise its functions, perhaps it might well be said that the State could not take away a part, and insist on the corporation exercising what remains. But our Code—section 1685—authorizes a corporation to surrender its franchises. It was argued that the decision in the case of the Mechanic's Bank vs. Hurd, 37th Georgia, 401, is contrary to this. But that charter was one granted before the Code, and was irrepealable. This court has not held that a corporation, created since the Code, may not surrender its franchises without the consent of the State. Indeed, such a right would seem to follow from the reservation of the right to repeal. A contract ought to be equal, and it was doubtless just because the right to repeal was reserved that the section authorizing a surrender was made a part of the system. If, then, the Legislature has a right to withdraw the whole franchise, it is within its sphere to withdraw a part. If the stockholders do not desire to keep what is left, they can surrender. But at best this objection is only a formal one. If the right to repeal exists, the Legislature may clearly, at its pleasure, enact that the charter shall be repealed, unless the corporation consent to pay taxes like other people; and practically this would, without doubt, be the consequence were this case to turn solely on the point that this is not a repeal, but only a modification.

But there is another ssction of the Code which is per inent to this discussion. Section 1651 of the Code is as follows:

"Persons are either real or artificial. The latter are the creatures of the law, and except so far as the law *forbids* it, subject to be changed, modified or destroyed."

Now here is a clear declaration of the right to modify, change or destroy, unless the law forbids it. Evidently the codifiers had the very provisions found in section 1682 and 1683, in mind, as to private charters granted before the Code, the law—to-wit: The Constitution of the United States *forbids* the repeal or modification. As to private charters granted since the Code the Legislature might forbid it, by so expressly contracting in the charter. Both these provisions ought to be taken together. They were the product of one mind, at the same time, and by taking them together, it seems to me that the

law makers most surely used the word "with draw," in section 1682, with the idea that it included the right expressly declared in section 1651, to change and modify as well as destroy.

The Southwestern Railroad Company stands on the same footing as the Central.

In both cases the intent was not a purchase, but a consolidation; this is the very language used, and this the effect of the thing done in both cases. In my judgment, and according to the authorities, this consolidation can only be done by the dissolution of both companies, and the creation of a new, under such name and charter as the act of consolidation requires. This is the legal, necessary effect of a consolidation. The authority of consolidation is a legislative authority to surrender the old and take up the new, and when the companies do consolidate, the old is surrendered and the new accepted.

Nor is there anything in the point that the authority to consolidate was granted before the Code. The consolidation was after the adoption of the rule changing the common law presumption that charters are perpetual unless limited in terms. The act permitting the consolidation was not a charter until accepted. Until then, it was subject, even under the old law, to repeal or modification at the will of the State. No rights had vested, no contract had been entered into. It was a mere proposition. The sections of the Code to which I have referred modified this proposition. Under the offer, as the law stood, to-wit, the common law, there was no limit as to time, and under the Constitution of the United States the charter, being thus unlimited, would have been irrepealable if accepted. But before the acceptance this common law was altered. There was a limit fixed of thirty years, and besides, it was provided under the two sections of the Code to which I have alluded, that a charter might be modified or withdrawn.

That the grant was nothing till accepted is well settled. Dartmouth College vs. Woodward, 4 Wheat, 791; State vs. Dawson, 11th Indiana, 40; Kinebec Bank vs. Richardson, 1 Greenleaf, 81."

That judgment is brought here for review:

ARGUMENT FOR THE STATE OF GEORGIA.

1. The tax act of 1874 (acts of 1874, p. 107) above quoted, if constitutional, repealed the exemptions from other than limited taxation contained in the charters of said railroad companies.

Is there "any difference in the legislative proceeding by which an act of incorporation (in which the Legislature has reserved the right of repeal) is repealed, and that by which any other act is repealed?" * * * * * We find no such distinction anywhere drawn. The common law doctrine is, that "every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; for *leges posteriores priores contrarias abrogant.* (Dwarr on

Stat., 673.) In view of this common law, we cannot recognize the distinction taken."

The Union Branch R. R. Co. vs. The East Tennessee and Georgia R. R. Co., 14th Ga. R., 338.

2. It is not material that the act of 1874 is general and those exemptions are special laws.

"Whether a general law repeals any of the provisions of a special charter is a question of legislative *intention*. If the words of repeal are so strong as to admit of no doubt as to the *intention* to repeal, they shall take effect."

Mechanics' and Traders' Bank vs. Bridges & Boyle, 1 Vroom (30 New J. R), 112.

"The *charter* of the Morris and Essex Railroad Company subjects the company to a tax of one and a half per cent. on the cost of the road, as soon as the net proceeds shall equal seven per cent., and provides that no other tax shall be levied upon the company. By the terms of the charter it may be altered or repealed by the Legislature. The subsequent *general* tax law of 1862 subjected to taxation the real estate of all private corporations, 'except those which by virtue of an irrepealable contract in their charters, or other contracts with the State, are expressly exempt from taxation,' and it repealed all acts, whether special or local, inconsistent with its provisions. *Held*, that the tax law of 1862 repealed the provisions of the charter in regard to taxation, and that the assessment made upon the real estate of the company in the township of Morris was rightfully made under the *general* law."

The State, Morris and Essex Railroad Co vs. Miller, Collector, 1 Vroom (30 N. J R.) 368.

"The act of April 12, 1859, expressly repeals any existing law inconsistent with the provision as to taxation, and as defendants are considered to be within the words of the act, the limitation of taxation in their fifth section is clearly altered or repealed. This seems to be assumed to be the necessary effect of such a law imposing a tax where none was imposed before, in the Iron City Bank vs. City of Pittsburg, 1 [illegible] right, 340, 348." Com. vs. Fayette County Railroad Company, 55 Penn. St. R., 455.

The old law restricted this taxation. That was considered an evil. The act of 1874 put the property of railroad companies on the level of other property, as to taxation, Its preamble declares its *purpose* "to *repeal* so much of the charters of such companies, respectively, as may conflict with the provisions of this act;" its repugnauce to these charter exemptions is absolute, and it repealed all conflicting laws. There can be no doubt as to its *intention*. Indeed, that is conceeded; for the defense is put wholly on the ground that the act of 1874 is void, as to these companies, because it impairs the obligations of their alleged contracts with the State of Georgia.

3. What are the alleged contracts? With the (old) Central Railroad and Banking Company it is that said corporation "shall, after

the lapse of said twenty-five years" (of exclusionary "right,") "be and remain incorporated and vested, as to *their own works*, with all the estate, rights, powers and *privileges* by this act granted and secured, except the exclusive right aforesaid, and except the banking privileges hereby granted." Record 13, §18 of amended charter. (This twenty-five years had expired, or was about to expire, in 1870. Ib., 25.)

As to the Macon and Western Railroad Company a declaration in 1969 that it should thereafter "*pay* the same annual tax to the State as the other railroad companies of this State now do, viz: one-half of one per cent. on the amount of net income." Ib, 28, 29.

As to the (old) Southwestern Railroad Company: "The said railway and its appurtenances, and all property therewith connected, shall not be taxed higher than one-half of one per cent. upon its net income." Record, 7, §19.

As to the Muscogee Railroad Company: "The capital stock of said railroad company shall not be taxed by the State higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on stock of said company." Ib., 10, §5.

May not the words "remain a corporation as to its own works," etc., be construed to have been intended *simply* to prevent a reversion of its property, etc., on dissolution?

Bacon *et al* vs Robertson *et al.*, 18th Howard's R., 483.

May not the rights, powers and privileges to remain be the ennumerated *corporate* rights, powers and privileges mentioned in the charter in §§14, 19, 20?

"If there be a reasonable doubt about this having been done," (*i. e*, "the power to tax has been *clearly* relinquished by the State") "that doubt must be solved in favor of the State."

Wilmington Railroad vs. Reed, 13th Wallace's R., 276.

To the same effect are:

Providence Bank vs. Billings, 4th Peter's R., 514.

Charles' River Bridge vs. Bridges, 11th Peter's R., 420.

Ohio Trust Company vs. Debolt, 16th Howard's R., 416.

P. & W. R. R. Co. vs. Md., 10th Howard's R., 376.

Rice vs. R. R. Co, 1st Black's R., 359

Gilman vs. Seboygan, 2d Black's R., 436.

Tomlinson vs Branch, 15th Wallace's R., 460.

The Delaware R. R. tax, 18th Wallace's R., 206.

North Missouri R. R. vs. Maguire, 20th Wallace's R., 46.

The latest declaration on this point, by the court, is very emphatic:

"The court has, however, in the most emphatic terms, and on every occasion, declared that the language in which the surrender" (of taxing power) "is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A State cannot strip itself of this most essential power by doubtful words. It cannot by ambiguous language be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from.

Erie Railway Company vs. Pennsylvania, 21st Wallace, 498.

Indeed, were not this court bound by the long current of its opinions so to hold, we would confidently argue that no State can contract away "this highest attribut of sovereignty."

But, conceed that a State can so bind itself, even to suicide, yet it does not avail the plaintiff in error here, because the "consolidation" made each of the plaintiffs in error a new corporation, taking its powesr from the date of such "consolidation," and subject to the laws then in force.

Because they are pertinent to these railroads, we allude first to certain decisions of the highest court of Georgia. The first is as to the old Muscogee Railroad, mentioned in the record as part of the present Southwestern Railroad Company. It sued Winter on his subscription for its stock. The court held this language:

"By the original act of incorporation, the road was to be constructed from the city of Columbus to some point at or near the Munroe Railroad, from Macon to the terminus of the Western and Atlantic Railroad, in DeKalb county.

"By the act of April of 1850, the Muscogee Railroad Company was authorized and empowered to connect their road with the Southwestern Railroad at Fort Valley, or at any point between Fort Valley and the city of Macon. * * * Was the alteration of the eastern terminus of the Muscogee Railroad, at or near the Munroe Railroad, from Macon to the terminus of the Western and Atlantic Railroad in DeKalb county, to the Southwestern Railroad, at Fort Valley or the Wolf pen, without his assent, such a material alteration of the defendant's contract under the original charter, as will release him from the payment of his stock subscription thereto? * *

"The original charter contemplated an independent road from Columbus to some point at or near the Munroe Rallroad, between the points designated therein, to be controlled and managed by the company itself, independent of any other company, and, under such a charter, the defendant subscribed for stock to build the road, but never subscribed for stock to build a road from Columbus, to connect with the Southwestern Road at Wolf pen, fifty miles from Columbus. When called on to pay his subscription for the building of such a road, without his assent, he may truly say, *"non hæc fedeva veni."*

Winter vs. Muscogee Railroad Company, 11th Georgia Reports, pages 446, 548 and 452.

On the 13th of December, 1866, the General Assembly of Georgia passed the following act: "An act approving the consolidation of the Dalton and Jacksonville Railroad Company, and the Georgia and Alabama Railroad Company of the State of Georgia, with the Alabama and Tennessee River Railroad Company, of the State of Alabama; and to authorize the consolidated company to adopt a corporate name and charter, and to act under the same."

SECTION FIRST. *Be it enacted*, That the consolidation of the Dalton and Jacksonville Railroad Company, and the Georgia and Alabama

Railroad Company, of the State of Georgia, with the Alabama and Tennessee River Railroad Company, of the State of Alabama, so as to form one consolidated railroad company, for the construction and use of a railroad to be constructed from Blue Mountain, in the State of Alabama, as a continuation of the Alabama and Tennessee River Railroad, by way of Rome, to Dalton, in the State of Georgia, be, and the same is hereby, ratified and approved, and the said consolidated company, acting by its board of directors, shall be, and it is hereby, authorized and empowered to adopt the corporate name and style of the Selma, Rome and Dalton Railroad Company, and to adopt as its charter the charter of said Alabama and Tennessee River Railroad Company, as now existing, with the amendments thereto, and under and by the said name, and style, and charter, is authorized, may, and shall have, possess, enjoy and exercise all its lawful rights, franchises, powers and privileges, and shall be subject to all lawful liabilities and responsibilities incurred or contracted, or to be incurred or contracted, by said consolidated company: *Provided always*, That nothing in this act shall be so construed as to release either of said companies from any obligation or liability incurred, or contracted by them, or either of them, prior to their said consolidation."

SECOND SECTION. Repeals conflicting laws.

Said companies, consolidated by an agreement, which declared: "All the debts, contracts, and obligations, and liabilities, of each of said parties to this contract and agreement, are hereby assumed by the consolidated company formed under this contract."

The agreement bound each to procure legislative sanction of this agreement and consolidation, and the above act was the legislative sanction agreed upon. Harbin had sued the Rome and Jacksonville Railroad Company, and pending his suit, said railroad companies became consolidated. The Supreme Court held that he could not recover in that suit, against the "new company," upon a contract made with one of the old; at least until the new company was made a party, and had notice of the suit. The Selma, Rome and Dalton Railroad Company vs. Harbin, 40 Georgia Reports, 706.

Prior to the consolidation between the Central Railroad and Banking Company and the Macon and Western Railroad Company, to-wit: in May, 1871, the Central Railroad and Banking Company agreed to lease the Macon and Western Railroad Company, and certain stockholders sought to enjoin the consummation of the contract. The Supreme Court of Georgia, by a majority, held that the Central Railroad and Banking Company had authority to make such a lease, and refused the injunction. McCay, Justice, dissented, not upon the ground that they had not authority to *lease*, but because he believed the agreement was not a lease, but a purchase, and, therefore, *ultra vires*. He used this language: "A subscriber who has taken stock in an enterprise, does not agree that the majority shall, even with the legislative assent, divert his funds to a *new* and *different* enterprise, against his consent." The Central Rail-

road and Banking Company vs. the Mayor and Council of Macon, 43 Georgia Reports, pages 605 and 655.

The same principle is recognized in Tennessee: Miller and the Mississippi Railroad Company against Lancaster *et al.* 5th Caldwell, Tenn. Rep, 514.

In Pennsylvania "an act was passed on the 5th of May, 1857, providing for the entire merger of the Lebanon Valley Railroad Company, and all its corporate rights, powers and privileges into the Philadelphia and Reading Railroad Company, so that the two corporations might be consolidated into one; and the property, rights, franchises and privileges of the Lebanon Valley Railroad Companp might be transferred to and vested, in the Philadelphia and Reading Railroad Co. The mode of affecting this merger was to be by a joint agreement of the directors and managers of each corporation, under their respective corporate seals, prescribing the terms and conditions, and the manner of converting the capital stock of Lebanon Valley Railroad Company into the stock of the Philadelphia and Reading Railroad Co. This agreement was to be submitted to the stockholders of each of said companies, and a vote by ballot taken for the adoption or rejection of the same; each share entitled to the holder thereof to one vote, and if a majority of all the votes cast at each of said meetings should be in favor of adoption of said agreement, such fact was to be certified, and a copy of the agreement, filed in the office of the Secretary of the Commonwealth, whereupon the Lebanon Valley Railroad Company should be deemed to have been merged in the Philadelphia and Reading Railroad Company.

Held: A railroad corporation may abandon its charter, and dissolve itself, except so far as its public duties as conservators of a highway may limit this power, and the Legislature may release it from this limitation, and allow a transfer of its duties to other hands. A single stockholder has no right to object to a transfer of all the property of the corporation to another company under the authority of the Assembly. But he cannot be compelled by law to accept the stock of the other company in payment for the shares held by him, and a court of equity will restrain the corporation and its officers from entering into a contract to that effect."

Lauman vs. Lebanon Valley Railroad Company. 30 Penn. State Reports, pages 42 and 43.

The court will notice the similarity of this Pennsylvania consolidation act with that of the Central Railroad and Banking Company, at bar. The latter seems to have been copied from the former.

The question has frequently arisen in Illinois: "It follows from these authorities that an alteration in a charter may be so extensive as to work a dissolution in the contract of subscription."

"An amendment which essentially changes the nature and object of a corporation will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad, cannot be converted into a company to an improvement of a different character, without consent of all corporators. A road intended to secure the

advantages of a *particular line* of travel and transportation, cannot be so changed as to defeat the general object."

"The corporation must remain *substantially the same*, and be designed to accomplish the *same general purposes*, and subserve the *same general interests.*"

Banet vs. the Alton Sangammon Railroad Company, 13th Ill, R., pages 511 and 512.

There the change was held good as not making a new contract, because "the *termini* remained the same, the only change consisting in a deviation from an intermediate point, the work is still designed to accommodate the same line of travel and transportation, and promote the same general interests, the length of the road is reduced, and the cost of constructiou diminished." Ibid, page 513.

"When a company was incorporated to build a railway across the State, as a continous project, under one management, with a common interest, if the charter is afterwards amended, so as to defeat the project, and three parties to be under separate control, the unity of interest being destroyed, and no proper acceptance of the change of the charter has been manifested, subscribers to stock will be released —the change being so extensive and radical as to work a *dissolution* of the original contract."

Supervisors of Fulton county against Mississippi and Wabash Railroad Company, 21 Ill. Reps., page 338.

In the text is this conclusion: "At any rate is not *the corporation in which the plaintiffs intended to become stockholders.*—Ibid, 371.

A.. by his note, promised to pay to the Terre Haute and Richmond Railroad Company $200, in consideration that they would locate their depot in block 94, in Indianapolis, to be paid when the company should commence the construction of the depot. When the note was given, the line of road provided for by the charter of said company, extended from Terre Haute, through Indianapolis, to Richmond, a distance of 150 miles.

The company afterwards procured from the Legislature, and accepted an alteration of their charter, by which their line of road was limited to the distance between Terre Haute and Indianapolis, being thus reduced in length one half, and the other part of the line was placed under a separate corporation, denominated the Indiana Central Railroad Company, which constructed its road, and located its depot in another part of Indianapolis.

The first named company constructed its freight depot alone on said block 94. A. was not a stockholder in the company nor a party to the charter.

Held, That, by the alteration of the charter of the Terre Haute and Richmond Railroad Company, and the acceptance thereof by the company, *the company became substantially a different corporation*, and unable to perform the conditions upon which the note was to become payable.—Carlisle vs. Terre Haute and Richmond Railroad Company, 6 Ind. Reps., page 316.

"*Corporations can only consolidate with the consent of the Legislature;*

and when a consolidation is thus effected, it amounts to a surrender of the old charters, and the formation of a new organization, out of such portions of the old, as enter into the new."

The State vs. Bailey, 16 Ind, R., p. 46,

"Where the Legislature gives its consent to the consolidation of existing corporations, the effect is to *dissolve the former corporations and at the same instant to create a new corporation, with property, liabilities and stockholders derived from the old, upon such terms and conditions as may be prescribed by the act of consolidation."*

A corporation may be dissolved by a surrender of it franchises, and the acceptance of them by the Legislature."

McMahon vs. Morrison, et al, 16 Indiana page 172.

And in almost every State in the Union are similar decision. See Greene's Brice's *ultra vires*. But it is useless to quote them, since this court has disposed of the question by affirming the case last quoted.

"The statute of Indiana, passed February 23d, 1853, which authorized connecting railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes when consolidation is effected, as is declared by the Supreme Court of the State in McMahon against Morrison, et al. 16 Indiana, page 127, *a dissolution of the previons companies, and creates a new corporation, with new liabilities derived from those which have passed out of existence*, Clearwater vs. Merideth, *et al.*, 1 Wallace Reports, page 25.

In the Delaware tax case, in 18th Wallace Supreme Court Reports, page 206, the consolidation of existing railroad companies was treated as making a new corporation, and this court spoke of it as a new corporation.

To apply that principle to the case at bar.

The Central Railroad and Banking Company of Georgia was created in 1835, to build a road "from the city of Savannah *to* Macon. (Sections 5, 9, 10, 14 of its charter *ante*.) The Macon and Western Railroad Company was made out of the old Munroe Railroad Company, in 1847, to build a railroad *from* Macon *to Atlanta*, a hundred miles from Macon, away from "the interior of the State.

They existed as separate and distinct corporations even after the Central Railroad and Banking Company leased the Macon and Western Railroad, in 1871, and till upon their *separate* request, made to the State, which had contracted with *each*, they were authorized to "*consolidate*," so as to destroy the Macon and Western Railroad Company absolutely, and change the identity of the Central Railroad and Banking company so essentially that no stockholder in either could have been *forced* to take or keep stock in the consolidated company without the exercise of the State's right of eminent domain.

The same is true of the consolidation of the old Muscogee Railroad Company and the old Southwestern Railroad Company *mutatis mutandis*.

Greene's Brice *Ultra Vires*, 84 note.

(For further enforcement of this point, see the rude map of the said several railroads in question following:

Why could not stockholders be so *forced?* Because the destruction of these two seperate corporate existences, and merger of them into one, was a novation. The State, so far as contract is concerned, stood in the same relation to each separate railroad as did its separate stockholders. With her consent the contracts with the two old companies were destroyed by the new contract with the consolidated company. The reasoning of Judge McCay, *ante*, is very clear on this subject. Well does he say that these "consolidation" acts cannot be treated as *amendments* of existing charters. Amendments are not so made.

Now, if plaintiffs in error, by consolidations, become new corporations, when did they become so?

Plainly the Central Railroad and Banking Company, the new corporation, became such after August, 1872, the date of the act allowing the Macon and Western Railroad Company, and the old Central Railroad and Banking Company of Georgia, to consolidate.

See Record, 27, 28.

The Southwestern Railroad Company became a new corporation in *November*, 1868. True, the act allowing the Muscogee Railroad Company and the (old) Southwestern Railroad Company to consolidate was passed on the 4th of March, 1856. But it provided that the stockholders should "agree" that "the holders of stocks in the Muscogee Railroad Company should surrender their certificates of stocks to the Southwestern Railroad Company, and receive other stock in lieu thereof, and '*thenceforward*' have the rights granted by said act." And it was expressly asserted in the 5th section of said act: "That this act shall go into operation when, *and not until*, there shall be a majority of two-thirds of the stockholders, in amount of stock of each of said companies, in favor of this union and consolidation, and of the provisions of this act. *certified under the corporate seals of said companies, respectively, to his Excellency, the Governor of this State.*" And it is admitted that that agreement, etc., were not had and consummated till November, 1868.

The act provided in §6 that until the union and consolidation "take effect" nothing in the act should "affect, alter, or change in any way the present existing rights of said companies, respectively."

Upon and not before consolidation the rights attached. It would lead to many absurdities to hold that because *permission* to consolidate was given in 1856 the Muscogee Railroad Company, and the old Southwestern Railroad Company have not existed as distinct corporations *between* 1856 and 1868. The decision of the Supreme Court of Georgia on that point cannot be gainsayed.

If, then, plaintiffs in error became corporations since the 21st of July, 1868, under what laws do they exist? First, the Constitution of Georgia (which went into effect on the 21st of July, 1868.) It declared, in its "Declaration of Fundamental Principles," "taxation

ple of the State," and if plaintiffs in error are correct, we would have these railroads paying no tax, except on income, while others, having no charter exemptions, could and would be taxed differently.

But suppose that the General Assembly of Georgia may constitutionally leave these railroads to pay one tax, and require a different tax from other railroads, if these charters date since 1863, they are subject to repeal or modification by the General Assembly.

The Code of Georgia which took effect on the first of January, 1863, declared:

"Persons are either natural or artificial. The latter are the creatures of the law, and exempt so far as the law *forbids* it, subject to be changed, modified or destroyed, at the will of their creator; they are called corporations."— § 1651.

"A corporation is an artificial person, created by law for specific purposes, the limit of whose existence, powers and liabilities is fixed by the act of incorporation, usually called its charter."—§ 1670. "Corporations are either public or private."—§ 1671. "A public corporrtion is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose, such as municipal corporations."—§ 1672. "All others are private, whether the object of incorporation be for public convenience or individual profit, and whether the purposes be, in its nature, civil, religious or educational."—§ 1673

"Should any charter granted in future by the General Assembly to a private corporation, be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant." § 1678.

"In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."—§ 1682. "Private corporations heretofore created, without reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State."—§ 1683. "Every corporation is dissolved" by * * "a surrender of its franchises."—§ 1684.

These new consolidated charters were accepted under this general law, reserving the right to withdraw the franchise, and the exercise of that right cannot impair the obligation of the contract made in those charters. "The charter of all the railroad companies, which were to be affected by these acts, were subject to alteration, amendment or repeal, at the pleasure of the Legislature, under the several provisions of law concerning corporations." Revised Stat. chap. 44, sec. 23. Under these broad reservations it was within its power, completely to determine in what mann r the franchises granted, in the exercise of eminent domain, for important public purposes should be enjoyed and exercised. Railroad Company vs. Grand Junction Railroad and Depot Company, 4th Allen's Mass. Reps., page 205.

"It is said by the defendants that this act is unconstitutional, because it violates the vested rights of the defendants, acquired under their act of incorporation. If this were so, the act can have no ef-

fect. But all acts of incorporation passed since March 11, 1831, which contained no express provision limiting their duration, are by the statutes of the commonwealth, existing from that period to the present, subject to alteration, amendment, or repeal. Stat. 1831, chap. 81. Revised Stat., chap. 44, sec. 23. The act incorporating the defendants was passed in the year 1844, long after the enactment of the Revised Statutes, and was, of course, accepted by the corporators, subject to the provisions of these statutes. This seems to put at rest all further questions as to the constitutionality of the statutes of 1846, chapter 82, and this being so, the defendants are bound by it, and must govern themselves accordingly.—City of Roxbury vs. Boston and Providence Railroad, 6 Cushing, 424."

Mass. General Hospital vs. State Mutual Life Assurance Company of Worcester, 4th Gray, Mass. Reps., 234.

"The Legislature of the Commonwealth, before the granting of the charter of the Hadley Fall Company, had declared that every act of incorporation passed since March 11, 1831, should 'at all times be subject to amendment, alteration, or repeal, at the pleasure of the Legislature,' with a provision that no such act containing an express limit of its duration should be *repealed*, unless for some violation of charter, or other default; this statute first introduced into the general Legislature of the Commonwealth, by statute, 1830, chapter 81, and re-enacted in the Revised Statutes, chap. 44, sec. 23, and the general statutes, chap. 68, sec. 41, *has been as much a part of all charters since granted, as if inserted therein*, and was manifestly adopted with the intention of reserving for the future a fuller parliamentary or legislative power, than would otherwise be consistent with the effect to be allowed to the special terms of particular charters, under the judicial construction of the constitutional provision against impairing the obligation of contracts."

The court then questions whether there is not a limit to this power. Commissioners on Inland Fisheries vs. Holyoke Water Power Company, 104 Mass. Reps., page 451.

The same principle was held in the city of Roxbury against the Boston and Providence Railroad Company, 6 Cushing, Mass. Reps. 424. But it should be stated that these the court said, the alteration or amendment should be "reasonable."

"The charter of Morris and Essex Railroad Company subjects the company to a tax of 1½ per cent. on the cost of the road, as soon as the net proceeds shall equal 7 per cent., and provides that no other tax shall be levied on the company. By the terms of the charter, it may be altered or repealed by the Legislature. The subsequent general tax law of 1862 subjects to taxation the real estate of all private corporations 'except those which, by virtue of an irrepealable contract in their charters, or other contracts with the State, are expressly exempted from taxation,' and it repealed all acts, whether special or local, inconsistent with its provisions.

"Held: That the tax law of 1862 repealed the provision of the

charter in regard to taxation, and that the assessment made upon the real estate of the company, in the township of Morris, was rightfully made under the general law.

"2. No 'irrepealable contract' can result from provisions in a charter, which is made in terms subject to alteration, amendment, or repeal, by the power granting it.

"3. Where the right to amend or alter a charter, whenever the public good may require, is reserved, the Legislature is the proper tribunal to determine when the right shall be exercised."

The State and the Morris and Essex Railroad Company. 30 New Jersey Rep., 368.

"Where, at the time of a grant of a charter to a corporation, there is a general law of the State that the charter of every corporation granted by the Legislature shall be subject to alteration, suspension, or repeal, in the discretion of the Legislature; the Legislature in granting such charter must be deemed to have reserved to themselves the right of altering, suspending, or repealing the same, whenever, in their discretion, the public good may require it; as fully as if the reservation were inserted in the charter; and all contracts, express or implied, resulting from the act of incorporation, and its acceptance by the stockholders, must be deemed to have been entered into by both parties subject to the reservation."

Story vs. The Jersey City and Bergen Point Plank Road Company. 16 New Jersey, page 13.

"1. A railroad company was incorporated, subject to the provisions of the railroad law of February 19, 1849, with a provision that it should not be taxed until its dividends amounted to 6 per cent. per annum. A subsequent act subjected all corporations to a tax on each one per cent of its dividends.

"Held: That the company was taxable under the latter act, on a dividend of less than 6 per cent. per annum.

"2. The provisions of the act of 1849, allowing the Legislature to amend, etc., charters, authorized the imposition of the tax by the latter act.

"3. Whenever a power to repeal, alter, or amend a charter is reserved in it, its exercise does not impair the obligation of the contract."

Commonwealth vs. Fayette county Railroad Company. 55 Penn. State Rep., page 452

"Under the section of the revised statutes declaring, that the charter of every corporation thereafter to be granted, shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature, the Legislature has power to alter and amend a railroad charter granted since the revised statutes, *although there is no clause in the charter* reserving to the Legislature the right to alter or amend it with the consent of the company."

Suidam vs. Moore and another, 8th Barber, N. Y. Reports, 358.

"Where a company was incorporated in 1848, under the public road act of 1847, and the defendant then subscribed to its stock, and the

company, by virtue of a subsequent act of the Legislature, without his consent, increased its capital, and applied its funds to the construction of a branch road not authorized by its original organization. Held: That the defendant was not thereby released from his subscription."

Schenectady and Saratoga Plank Road Company vs. Thatcher, 1st Kernan, N. Y. R., page 102.

See also Pacific Railroad Company vs. Renshaw, 22 Missouri R., page 291.

"In Main, New Jersey and Wisconsin the opinion prevails that while the Legislature may grant the power, the stockholders cannot be *compelled* to exercise it, nor can the Legislature authorize a majority to adopt alterations, or enter upon enterprises not contemplated by the original charter, against the dissent of any one stockholder." Meadowdam Company vs. Grey, 30 Maine, 547.

Oldtown and Lincoln Railroad Company, vs. Veizie, 30 Maine, 571. Zabriskie vs. Hackensack and New York Railroad Company, 3 C. E. Green, 178. Kenosha, Rockford and Rhode Island Railroad Company vs. Marsh, 17 Wis., page 13. See Delaware Railroad Company vs. Thorpe, 1st Houston Del. R., page 454. Green's Brice's *Ultra Vires*, page 84, note.

It would seem a waste of time to have made such lengthy, and so numerous, quotations from State reports, when both the authorities in England and America have been fully revised by this court, in Nugent against the supervisors—19th Wallace, page 242—where the court announced the following principle: "Although a subscriber for stock in a company is released from his subscription by a subsequent alteration of the organization, or purpose of the company, *this is only when such alteration is a fundamental one, and when, in addition, it is not provided for or contemplated by either the charter itself or the general laws of the State.*"

But I have made these quotations with a view to compare the law in these States with those of the statute of Georgia; for it was claimed by plaintiffs in error that statutes of other States reserving control over corporations use the words "alter, amend or repeal," while that of Georgia uses only "to *withdraw* the franchise."

In looking for the proper construction of those words, (if none other were used), the court would at once see the evil intended to be remedied, would consider that our law makers had the action of Pennsylvania and other States on the subject in view, and would readily suppose that they intended to put Georgia on a footing with those prosperous States. (For though the Code did not go into effect till January, 1863, it had been begun under an act of December 9, 1858.) If it were *res integra*, therefore, it would be sound logic to say, "withdraw the franchise" embraced the right to withdraw a part of the same.

It *seems* to have been so held in New York.

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In looking for the proper construction of those words, (if none other were used), the court would at once see the evil intended to be remedied, would consider that our law makers had the action of Pennsylvania and other States on the subject in view, and would readily suppose that they intended to put Georgia on a footing with those prosperous States. (For though the Code did not go into effect till January, 1863, it had been begun under an act of December 9, 1858.) If it were *res integra*, therefore, it would be sound logic to say, "withdraw the franchise" embraced the right to withdraw a part of the same.

It *seems* to have been so held in New York.

"In the matter of Oliver Lee & Co., Bank, 21st N. Y. R., 17, is this language: "The corporations were to be created by the subscrib-

ing and filing articles of association, and there was a reservation to the Legislature of the right to alter, amend or repeal the act. (Laws of 1847, chap. 210.) There was, also, a right reserved to *amend* or *reaeal* any *corporation* created under the act; but none in terms to *alter* or *amend* the corporation," and yet it was held the same in 1st Kernan, 102, *ante*.

And the Supreme Court of Georgia has decided it.

In 1866 the Atlanta Street Railroad Company was incorporated with a grant of certain exclusive rights to use the streets of Atlanta for street railroads. In 1872 the West End Street Railroad Company was also chartered with certain rights, thought to be at war with the exclusive rights of the former. In a contest between them our Supreme Court held this language:

"When the company" (the former) "accepted the grant made by the General Assembly, it did so with a full knowledge of this general law, as much so as if it had been inserted in the act incorporating the company, and it is a well established rule that the laws which exist at the time and place of making of a contract enter into and form a part of it. The complainant's company, therefore, accepted the charter subject to the right of the State to withdraw, modify or restrict the franchise granted to it whenever the State should think proper to do so. The power to withdraw the entire franchise granted necessarily includes the power to modify it, or to restrict the exercise of it, and the question is, whether the General Assembly, by the passage of the act of 1872, has modified or restricted the complainant's franchise, as claimed under the act of 1866, even if it was *exclusive* to construct and use street railroads in *all* the streets of the city of Atlanta for thirty years?" They held it had so modified it by implication.

West End Street Railroad Company vs. Atlanta Street Railroad Company. 49th Ga. Rep., 158.

The question was, by *permission*, re-argued, and the decision reaffirmed in these cases, and in the State vs. the Georgia Railroad and Banking Company, at the same time and before the same bench, and again in the Atlantic and Gulf Railroad Company vs. the State at a subsequent term, before a new bench, except Warner, C. J. These decisions are yet unpublished. (In Georgia a decision by an unanimous court cannot be questioned without permission to review.)

How far this court is bound by that decision or the one in this cause upon the construction of Georgia's Constitution and her statutes, we leave this court to determine. We know that the general rule is for the court to be bound by such decisions.

We admit, however, that the 34th section of the Judiciary act of 1789 "has uniformly been supposed by the Supreme Court to be limited in its application to State laws strictly local: that is to say, to the positive statutes of the State and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles of real estate, and other matters immovable and intra-territorial in their nature and character." Swift vs. Tyson, 16th Peter's R., 1.

In the decision of the Atlanta Street Railroad Company vs. the West End Street Railroad Company, 39th Georgia Reports *ante*, the question was decided without reference to said section 1651 of the of the Code of 1863, which was section 1583 of the Code of 1863, (Leaving out our laws as to slavery has changed the numbers of the sections.) These sections are parts of the same Code adopted by an act of the General Assembly, (readopted by our Convention) as a whole. Considering them under known rules of construing statutes, can it be fairly said that section 1651, allowing charters "changed, modified or destroyed, at the will of the creator," "except as far as the law *forbids* it," is to be ignored and treated as naught in construing section 1682, which uses on the words "withdraw the franchise?" It seems opposed to all received rules of construction. It is well to remark that the word "forbids" is italicised in the Code, so as pointedly to connect it with the "expressively negatived" in the subsequent section. See Judge McCay's opinion *ante* on this point.

These decisions in Georgia have been uniform, and not "but oscillations in the course of such judicial settlement;" and we submit that to follow them will not "make a sacrifice of truth, justice and law," (Gelpeke vs. City of De Buque, 1 Wallace 176), nor either of them. It would but make the $45,000,000 invested in railroads shares the burden necessarily borne by our impoverished people.

But if wrong in the foregoing, surely the judgment of the Supreme Court of Georgia will be affirmed as to one-third of the tax assessed against the Central Railroad and Banking Company, plaintiff in error, and as to so much of the Southwestern Railroad as lies between Americus and Albany.

Remember that the Macon and Western Railroad Company was incorporated in 1847. Its charter did not contain *any* exemption from taxation, and no legislation on the subject of exempting it from taxes was ever had, except the act of February, 1869. Record, pages 28 and 29.

The Mayor and Council of Macon levied a tax upon property which had passed *from* the Macon and Western Railroad Company *to* the Central Railroad and Banking Company of Georgia. The Central Railroad and Banking Company of Georgia resisted the tax. The Supreme Court upheld it. In the opinion, it used this language: "The exemption from liability to the tax complained against in this case, is claimed by defendant in error under the act of February 9, 1869. The title and the first section of that act, which is all that is necessary to refer to, is as follows:" (quoting the same as ante in statement of facts.) They proceed: 'The consolidation or union of the Macon and Western Railroad with that of the Central Railroad, took place after these taxes had been assessed on the property of the former, and, therefore, the question is not affected by any provision in the charter of the Central Railroad. The taxes are for the years 1870, 1871 and 1872."

"Assuming, at this point, that the city of Macon had the power to levy these taxes prior to the act of 1869, the question is, did that act grant to the company an exemption of its property within the city of Macon from liability to be taxed by the city authorities as it was before the passage of the act. The terms of the act are really peculiar. There is, in words, no exemption whatever from any taxation, nor an express limitation as to the extent to which it might be taxed, even by the State. The words touching the question are; "*Provided, nevertheless,* that such additional stock as it may be assessed, as well as the present stock of said company, shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do, viz: One half of one per cent. on the net income."

"The most that can be *claimed* for this is, that the State, in its annual tax law, will not assess upon the stocks of the company, as tax for the State, more than one-half of one per cent. on the net income, and, for the reason, as a ground for such construction, the company, before this act, was liable to be taxed on the amount of its stock, say one-half of one per cent. on $1,500,000. If the stock was increased to $2,500,000 it would be liable to the same rule on the increased amount, to-wit: One half of one per cent. on *whatever the rate might be,* on the additional $1,000,000 of stock. To avoid this, the company, doubtless, desired some assurance, and as there was then a tax of one-half of one per cent on the net income assessed by the State on all railroads, and had been for eleven years, the provision quoted was inserted, making it subject to the general tax law as to railroads.

"But it is totally unlike the guaranty and exemption granted any other company. In the charter of the Georgia Railroad the clause is: "The stock of said company and its branches *shall be exempt from taxation* for and during the term of seven years from and after the completion, etc.; and after that, shall be subject to *a tax of not exceeding one-half per cent.* per annum on the net proceeds of *their investments.*" Prince's Digest, 308. Here is a clear negative against a liability to be taxed beyond the prescribed limit. And it was so held in The Georgia Railroad and Banking Company vs. The City Court of Augusta, 26th Ga. R., 651. And so in the charters of the other railroads which grant any *exemption, express negative words are used against the liability to taxation except at a specified rate,* such as "shall not be taxed higher," "nor shall any other tax be levied and collected," etc. In none of these is there any expression stating that no other tax, except at the specified rate, shall be levied "*by the State.*" or shall be paid to the State. In the charter of the Muscogee Railroad the words are, "shall not be taxed *by the State* higher than one-half of one per cent. upon its net income," but it is immediately added, "*nor shall any other* tax be levied or collected on the stock of said company."

"By the act of 1869, the Macon and Western Railroad Company was authorized to increase its capital stock to $2,500,000. No further road was to be built; no additional improvements were requied; nor

public interest to be subserved or benefit gained. So far as the act shows, it only authorized the directors, from time to time, to raise the then amount of capital stock, one and a quarter or one and a half millions, to two and a half millions. No burden was thereby to be assumed by the company which was not then upon it, except that the increased stock would have increased its liability to be taxed by the State. Hence, to guard against that, were probably added the words that it should hereafter "pay the tax assessed on other roads, one-half of one per cent. on net income."

"We do not say that this exemption was secured as a charter right under the peculiar phraseology of the act. It is not necessary to pass upon that. But it is our opinion that, under no proper construction of this act, can it be held that the real estate of the company, situated in the city of Macon, had any privileges secured to it against the taxing power of the municipal authority"

Mayor and Council of Macon vs. the Central Railroad and Banking Company. 50 Ga. Rep., 622, 623, 624.

The first head note is: "Statutes, under which exemption from taxation is claimed by corporations, will be strictly construed, and the exemption will not be held to be conferred, unless the terms under which it is grandted *clearly* and *distinctly* show that such was the intention of the Legislature." (Ib., 620.) That decision was by the same bench, which afterwards decided the cases at bar.

As to the Southwestern Railroad Company, we quote a statute of Georgia:

"An act to amend the charter of the Southwestern Railroad Company, and to authorize an increase of the capital stock of said company," etc.

WHEREAS, In and by an act of the General Assembly of Georgia, approved 22d of January, 1852, entitled an act to incorporate the Georgia and Florida Railroad Company, and to confer certain powers and privileges therein mentioned, it was enacted as follows, to-wit:

SEC. II. "That the Georgia and Florida Railroad Company may, at any time, incorporate their stock with the stock of any other company, on such terms as may be mutually agreed upon by such companies: *Provided*, That the road, and other property of this company, shall be subject to such taxation as the Legislature may deem equitable and just: 'and whereas, the said Georgia and Florida Railroad Company did agree with the Southwestern Railroad Company to incorporate their stock with the stock of the said Southwestern Railroad Company, running from Americus to Albany, to the Southwestern Railroad Company, and secured stock of the Southwestern Railroad Company therefor to the amount of near five hundred thousand dollars, and thereby it became necessary to increase the capital stock of the said Southwestern Railroad Company.

SECTION 1. *Be it therefore enacted*, That the president and directors

of the said Southwestern Railroad Company be, and they are hereby, authorized to increase the capital stock of said company, and to issue stock, in addition to the amount mentioned in their charter, for any sum not exceeding five hundred thousand dollars.

SEC. 11. *Be it further enacted,* That the said railroad from Americus to Albany shall be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay to the State the same tax that the rest of the Southwestern Railroad Company is liable to pay, *and such additional tax as the Legislature may hereafter impose.*" Approved December 19th, 1859. Acts of 1859, pages 229–230. Here is an express reservation in the charter of the right to tax, free from restraint by contract.

This question seems to have been decided by this court in "The Delaware Railroad tax" case in 18th Wallace.

Headnotes. * * "The established rule of construction, in such cases, is that rights, privileges and immunities not *expressly granted* are reserved.

2. Accordingly, a provision in an act of the Legislature of Deleware, under which the original Wilmington and Susquehana Railroad Company was united with the Deleware and Maryland Railroad Company, requiring the new company to pay annually into the treasury of the State a tax of one-quarter of one per cent. upon its capital stock of $400,000, did not prevent a subsequent Legislature from a further or different tax upon the company. The amount designated was *only* a declaration of the tax payable annually *until a different rate should be established.*

After reciting the statutes of consolidation in that case, the court said: "The act of the Legislature of Delaware, under which the consolidation was effected, declared that the respective companies should constitute one company, and be entitled to all rights, privileges and immunities which each and all of them possess, have and enjoy, under and by virtue of their respective charters."

"Held, That this latter provision in no respect changed the position in reference to taxation of the new company, in one of the States, from that of the old company in such State."

The Delaware Railroad tax, 18th Wallace, R. 206, 207, and text 228 and 229.

To the same effect is Philadelphia, Wilmington and Baltimore Railroad Company vs. Maryland, 10th Howard's (U, S.) R. 377.

It follows that if the decision of the Supreme Court of Georgia under review is wrong as to the old Central Railroad, it is right as to the Macon and Western Railroad, and its part of the tax is, by the record, one-third of the amount named in the *fi. fa.* against the Central Railroad and Banking Company. The same principle subjects to this tax the $500,000 of that part of the Southwestern Railroad between Americus and Albany, which was the Georgia and

Florida R. R., and over which unrestricted right of taxation was expressly reserved by the act of 1859, above quoted.

Respectfully submitted by

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